WITNESSES IN SOUTH AFRICA, THE STEPCHILDREN OF THE CRIMINAL JUSTICE SYSTEM

by

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DECLARATION

I declare that this thesis is the result of my own, unaided work, and has not been submitted before for any degree or examination at any other university. All sources and materials consulted have been fully acknowledged.

Signed by candidate

14th day of **MAY** 1999

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Chapter 1

1. Introduction

1.1. General observations on the criminal justice system and witnesses

In South Africa the criminal justice system is primarily controlled by the Criminal Procedure Act[1] and its application in the criminal process. The introduction of a justiciable Bill of Rights[2] on 27 April 1994[3] ushered South Africa into a new legal and constitutional dispensation, which in turn affected the criminal justice system profoundly. In fact the criminal process has undergone an intense metamorphosis as a result of the introduction of the Bill of Rights. Witnesses and victims of crime have not escaped the impact of the Constitution on the criminal justice system. Their rightful place in the criminal justice process is the subject of this thesis.

Are witnesses really so important as to require special attention throughout the criminal process? If the predominant purpose of criminal procedure is to set rules, procedures and devices whereby justice can be administered fairly, impartially and expeditiously in the interest of the greater society, then undoubtedly witnesses fulfil a pivotal role in the process. Without the participation of witnesses there will be no justice in the criminal

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[1] Act 51 of 1977. Hereinafter referred to as the CPA.

[2] Under a justiciable bill of rights a court has the power to test not only executive acts on the basis that the norms laid down in the Bill of Rights and to annul any such act which is contrary to the said norms. See generally M Cappeletti 'Judicial review of constitutionality of state action: Its expansion and legitimacy' 1992 *TSAR* 256; Raymond Wacks 'Empire's law: Hong Kong's colonial bill of rights' 1993 *TSAR* 384; H F E Ruppel 'A bill of rights: Practical implications for legal practice - a Namibian perspective' (1992) 7 *SAPL* 51.

[3] It is on this day that the interim Constitution of the Republic of South Africa Act 200 of 1993, with its Bill of Rights, came into operation. Through the interim Constitution South Africa moved from a constitutional framework of parliamentary sovereignty, to the present situation where the Constitution with its Bill of Rights, is the supreme law of the land. The final Constitution of the Republic of South Africa Act 108 of 1996 came into operation on 4 February 1997. Hereinafter the final Constitution will be referred to as the Constitution.

process. Their role in the prosecution of crime must not be underscored and should not be neglected in the justice equation. They should therefore not be invisible participants in the justice process but should rather be treated with sensitivity and compassion throughout the criminal process. It goes almost without saying that any special treatment afforded to them should not be effected at the expense of violating the rights of offenders.

Can our justice system survive without the co-operation of witnesses? The answer to this question is 'no', which means that government should therefore do everything in its power to assure effective citizen participation in the system.[4] My preliminary view is that until now very little has been done by government in this regard. This research will seek to show that the South African criminal justice system has hitherto been offender rather than victim[5] orientated. This will be illustrated by focussing on the victimization that witnesses have to endure during various stages of the criminal process, to such an extent that they could even be punished[6] if they do not co-operate with the prosecution. It is quite ironic that these very same persons cannot demand just protection or relocation from the state to ensure that they will be safe after testifying.[7] As witnesses have a legal obligation to testify, government has a duty to protect them from intimidation by an accused. Witnesses who co-operate with the state by testifying in court should at least receive fair treatment in the very same process that accords an accused a fair trial as of right. Necessary assistance should therefore be rendered to witnesses throughout the criminal trial. In other words, threatened witnesses deserve protection for performing a

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[4] Two basic criticisms that could be raised at this preliminary stage are that victims are not kept informed and that victims who are required to testify as witnesses often find that the traditional procedures provided for in the CPA are not victim-friendly. This impression was gained by the writer, especially during the time spent as Senior Prosecutor at Wynberg Magistrate's Court during the period 1992 to 1995.

[5] This concept encompasses the term witness and will be used interchangeably. It is, however, acknowledged that not all witnesses are always victims of crime.

[6] Section 189 of the CPA.

[7] It is foreseen that many changes will be brought about through the implementation of the Witness Protection Act 112 of 1998. This Act is, however, not yet in operation. For a discussion of the Act see 2.3.2 *infra*.

legal duty that may jeopardise their lives. An absence of protection illustrates clearly that the system is not sensitive to the needs of witnesses.

In addition to the examination of witnesses' protection this study will investigate the treatment that witnesses receive at the various stages of the criminal process in order to illustrate further the shortcomings of the system. By investigating the various phases of the criminal process an attempt will be made to demonstrate that witnesses receive less than adequate treatment from the authorities and are, in effect, powerless in the handling of 'their' cases. The distinction between the role of offenders and that of victims will precisely illustrate this statement: offenders have the choice to actively participate in their trials or to be passive spectators, but witnesses and victims of crime do not have that same choice when they are chosen by the state to become witnesses in the trial.[8]

1.2 The approach of the present study

While the focus is almost exclusively on the South African procedural and substantive law, comparative analysis will be necessary to reveal the deficiencies in the current system and legislation. The criminal justice systems of the United States of America, the United Kingdom and other countries will be examined where they offer useful solutions for the deficiencies in the South African system. The point of convergence will be the treatment and protection that the victims of crime receive in these relatively advanced systems.

This study will examine the pre-trial, trial and post-trial stages as well as those sections of the CPA that affect witnesses during the different stages of the criminal process.[9] The substantive law of rape and the provisions of the Sexual Offences Act[10] will also be evaluated and discussed. With the provisions of the CPA as backdrop, the roles of the

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[8] See M Maguire 'The impact of burglary upon victims' (1980) 20 *British Journal of Criminology* 261.

[9] See ss 153, 158, 162, 163, 166, 170A, 179, 185, 185A, 189, 203, 205, 297 and 300 of the CPA.

[10] Act 23 of 1957 as amended.

prosecution[11] (investigative, bureaucratic and/or administrative) will be reviewed. For it is primarily the prosecution[12] that assists witnesses during a criminal trial. Where possible, case study methodology will be used to evaluate the aforementioned roles[13] of the prosecution and to evaluate the usefulness of certain statutory provisions. Conclusions drawn from the case studies and the discussions will be used to recommend appropriate and necessary changes to the law.

1.3 Protection of victims' rights and securing a better criminal justice system for all

At this preliminary stage it is the writer's opinion that there is an inherent tension between the rights of the victim and those of the offender. The position of victims is inferior to that of offenders, whose rights are guaranteed in both the interim and the final Constitutions of the Republic of South Africa.[14] In order to show that the system affords inferior protection to witnesses, attention will be focussed on special classes of witnesses: rape victims and child witnesses. The final stage of the trial, namely sentencing, will also be reviewed from the perspective of victims and the role they play at that stage.

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[11] In terms of s 20 of the National Prosecuting Authority Act 32 of 1998 the prosecuting authority has the exclusive right to institute and conduct criminal proceedings on behalf of the state and to discontinue criminal proceedings in the courts, superior and lower, save for private prosecutions instituted in terms of s 7 of the CPA. This provision should be read with s 179(2) of the Constitution, which provides for a single national prosecuting authority in the Republic to institute criminal prosecutions on behalf of the state. The Prosecuting Authority is headed by a National Director of Public Prosecutions.

[12] The different roles of public prosecutors will be investigated in view of the pivotal role that prosecutors fulfil in the administration of justice.

[13] In studying the Annual Reports of the various Attorneys-General in South Africa it is quite apparent that prosecutorial duties are often perceived to extend beyond the trial phase. See Annual Report of Attorney-General for the Cape of Good Hope 1995/1996 at 33; Annual Report of Attorney-General for the Free State 1997/1998 at 10; Annual Report of the Attorney-General for the Transvaal 1997/1998 at 4.

[14] The rights of detained and accused persons are enumerated in s 25 of the interim Constitution of the Republic of South Africa and s 35 of the final Constitution, which *inter alia* guarantees the right of an arrested person to be released on bail and to be informed upon arrest of the right to remain silent, and most importantly to be afforded the right to a fair trial (which includes the right to be presumed innocent), to name a few.

Traditional issues will be considered in the chapter on sentencing and the importance of victim compensation.[15]

It is submitted that the imbalance that exists between the rights of the offender and the rights of witnesses can be rectified once the rights of victims of crime are properly recognised and protected. Special attention will be paid to the protection afforded to witnesses in the United States of America, where at least twenty states[16] have accepted a 'bill of rights' for victims. Witnesses in these states are assured of a system that treats them with fairness and dignity. It is submitted that until similar procedures are adopted for victims in South Africa the words of Erasmus J in **Nombewu v S**[17] will remain mere rhetoric:

> ... the *Constitution* is not a set of high-minded values designed to protect criminals from their just deserts, but it *is a shield which protects all citizens* from official abuse.[18]

A fundamental purpose of government is the protection of all its citizens; therefore equal justice should be applied to all, whether they be a victim of crime or an offender. Without the participation of witnesses in our criminal justice system, the system will cease to function.

> Witnesses have varied personalities, backgrounds and information, but they all appear in court for the same purpose - to present information for the consideration of the court and jury of which they have knowledge of. Their function is not to be biased for or against one side of the case. They are not on the witness stand for the purpose of convicting or acquitting the accused, but as impartial bearers of the information.[19]

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[15] See discussion at 7.3 *infra.*
[16] As at 8 February 1996 twenty states had enacted a 'Crime Victims' Bill'.
[17] 1996 (4) All SA 621 (E).
[18] *Nombewu supra* at 648e. (Emphasis added)
[19] N C Chamelin et al *Introduction to Criminal Justice* (1975) at 277.

Chapter 2

2. Pre-trial treatment of witnesses

2.1 Compellability of witnesses

Any consideration of the treatment of witnesses should begin by examining (1) which persons are competent to give evidence and (2) which persons are compellable to do so - that is, whether giving evidence is an optional activity or one enforceable by the court. In order to determine whether giving evidence is an optional activity and therefore one in which witnesses may decline to engage, or an obligation enforceable by the court, questions of competency and compellability must be considered.[1] Once witnesses are determined to be competent and compellable, it would seem that the state might be in a position to unduly pressurise them to participate in the proceedings, and to force them to testify. A failure to testify may be met by the imposition of a penalty.[2]

The general rule of South African law is that all witnesses are both competent[3] and compellable to testify. The prosecution may compel nearly any person[4] to come to court

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[1] Cowen and Carter *Essays on the Law of Evidence* (1956) at 220 explain as follows:

> A *competent witness* is a person whom the law allows a party to ask, but not compel to give evidence. A *compellable witness* is a person whom the law allows a party to compel to give evidence. There are certain questions, which a witness may refuse to answer if he so wishes. He is said to be privileged in respect of those questions. It should be clear, therefore, that competence without compellability (or bare competence) is not the same as privilege. *Compellability* is concerned with whether a witness can be forced by a party to give evidence at all. Privilege is concerned with whether a witness who is already in the witness box is obliged to answer a particular question. The protection of privilege is exactly the same whether the witness is barely competent and of his own free will elected to give evidence or the witness is *compellable* and was *forced* to give evidence. (Emphasis added)

See general discussion by Schwikkard et al *Principles of Evidence* (1997) at 279 *et seq.*

[2] See ss 188 and 170(2) of the CPA.

[3] Section 192 of the CPA provides:

> Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give

to testify. Attendance of witnesses is procured by the issuing of subpoenas[5] to them.[6] The court may also call upon witnesses if their evidence appears to be essential for the just decision of the case.[7] Once subpoenas are duly authorised and issued in terms of s 179 of the CPA and served on witnesses, they are compelled[8] to comply with such subpoenas and be present at the appointed time and place. Such persons are required to co-operate and attend the court to give evidence or to produce documents when requested to do so.[9] In addition to the subpoena there is a simpler method used by lower courts to secure the attendance of witnesses, and that is to warn them by means of written notices.[10]

If witnesses should ignore subpoenas or refuse to answer questions put to them, they may be subjected to the sanction of imprisonment provided by the CPA.[11] Not only may witnesses be sentenced to imprisonment if they fail to obey such a court document but in certain circumstances they may even be detained.[12]

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evidence in criminal proceedings.

[4] Certain classes of witnesses are not compelled to testify even though they are competent, mainly for the reasons that they enjoy immunity or that they are married to the accused. See E Du Toit et al *Commentary on the Criminal Procedure Act* 2 ed (1997) at 23-23 to 23-24. Diplomatic personnel are indemnified as witnesses for the prosecution, see s 2 of the Diplomatic Immunity and Privileges Act 74 of 1989.

[5] Subpoenas are issued in terms of the rules of each specific court. See Uniform Rules of Court, rule 54(5)-(8) for Superior Courts and rule 64 of the Magistrates' Courts Rules.

[6] Sections 179 to 188 of the CPA deal with the attendance of witnesses at court. In terms of s 179(1)(a) of the CPA, the prosecutor or the accused may compel the attendance of any person to give evidence in a criminal trial.

[7] Section 186 of the CPA, provides the court with the authority to subpoena witnesses.

[8] Witnesses that are competent and compellable to testify, have to comply with the court documents served on them. Only once they are in the witness-box, may they claim privilege if entitled to do so.

[9] Ackermann J in *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) at 479, regards the honouring of a subpoena as a civic obligation recognised in all open and democratic societies and not an invasion of the freedom of an individual. See Leoni Stander and Linda Jansen van Rensburg 'Die grondwetlikheid van die ondervragingsprosedure ingevolge artikels 417 en 418 van die Maatskappyewet 61 van 1973 – *Bernstein v Bester* 1996 (2) SA 751 (CC)' (1997) 60 *THRHR* 348.

[10] Such notice is usually handed to the prospective witness by a policeman, and calls upon him or her to attend the criminal proceedings at a time and place stated therein.

[11] See s 189(1) of the CPA.

[12] See s 188 of the CPA.

2.2 Interrogation pre-trial

A question that often arises concerning witnesses, is to what extent witnesses can refuse to make statements to the police who in the in the course of their investigation of an alleged crime ask them to make a statement. More importantly, the question remains whether such witnesses could be compelled to co-operate with the state even though they do not want to. These questions can be answered by looking at s 205 of the CPA. This section provides as follows:

> (1) A judge of the supreme court, a regional court magistrate or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned prior to the date on which he is required to appear before a judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.
>
> (2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).
>
> (3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
>
> (4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give information contemplated in subsection (1), shall not be

> sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

In view of these provisions it is submitted that the s 205 procedure is aimed primarily at the gathering of evidence. What is disconcerting is that this information gathering may in certain instances happen at the cost of the witnesses concerned.[13] Witnesses, irrespective of who they are, are compelled to disclose the information to the court and if they do not co-operate they may face incarceration in terms of s 189 of the CPA, unless they have a 'just excuse'[14] for their refusal. The constitutionality of the section was challenged in **Nel v Le Roux**[15] but it survived constitutional scrutiny. Ackermann J was satisfied that the procedure adopted under s 189 of the CPA is not unique or unknown in other open and democratic societies based on freedom and equality.[16] He compared the section with grand jury investigations held in the United States of America, whereby information is obtained from persons that are unwilling to assist voluntarily in a criminal investigation. In the United States of America both civil and criminal contempt procedures[17] are then used to coerce recalcitrant grand jury witnesses to testify or to comply with the said subpoenas. In accordance with the United Stated Federal Criminal Code, witnesses are either sentenced to imprisonment or could pay a fine (which may increase daily), but they may purge themselves by complying with the subpoenas.

Witnesses therefore have due reason to feel vulnerable because, whether they are willing or not, they will have to co-operate with the state either by providing the state with the necessary information and/or by testifying in court once they are called upon to do so.[18]

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[13] See D R Khuluse 'Journalistic Privilege' (1993) 9 *SAJHR* 279.
[14] For a discussion of this concept see chap 3 *infra*.
[15] 1996 (1) SACR 572 (CC).
[16] *Nel supra* par 22 p 584.
[17] See Rule 42(a) of the American Federal Rules for Criminal Procedure.
[18] See *S v Mahlangu* 1999 (7) BCLR 826 (W) where the court held that a person subpoenaed in terms of s 205 of the CPA was merely a potential examinee and not a

2.3 Detention of witnesses

2.3.1 Detention of witnesses pre-trial

Whenever the Attorney-General[19] is of the opinion that there is any danger that potential state witnesses may be tampered with, or that such potential state witnesses may be intimidated, or that they may abscond, or whenever he deems it to be in the interests of such persons or the administration of justice, he may apply to a judge in chambers for an order that such witnesses be detained pending the relevant proceedings in terms of s 185 of the CPA. Section 185 of the CPA provides as follows:

> (1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the attorney-general likely to give evidence on behalf of the State at criminal proceedings in any court, and the attorney general, from information before him-
> (i) is of the opinion that the personal safety of such person is in danger or that he may abscond or that he may be tampered with or that he may be intimidated; or
> (ii) deems it to be in the interests of such person or of the administration of justice that he be detained in custody,
> the attorney-general may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

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witness yet. In rejecting the applicant's contention that he was entitled to information in possession of the state in terms of s 32 of the Constitution the court held that in terms of s 205 of the CPA he was under the obligation to give evidence and had no protectable right to information.

[19] It is envisaged that the National Director of Public Prosecutions will fulfil this function in future and that the CPA will have to be amended accordingly. See s 20 of the National Prosecuting Authority Act 32 of 1998.

(b) The attorney-general may in any case in which he is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the attorney-general within that time by way of affidavit places before a judge in chambers the information on which he ordered the detention of the person concerned and such further information as might become available to him, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.

(c) The attorney-general shall, as soon as he applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he has so applied for an order, and shall, where a judge under subsection (2)(a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person in charge shall without delay release the person detained.

(2) (a) The judge hearing the application under subsection (1) may, if it appears to him from the information placed before him by the attorney-general-

(i) that there is a danger that the personal safety of the person concerned may be threatened or that he may be tampered with or that he may be intimidated; or

(ii) that it would be in the interests of the person concerned or of the administration of justice that he be detained in custody, issue a warrant for the detention of such person.

(b) The decision of the judge under paragraph (a) shall be final:

Provided that where a judge refuses an application and further information becomes available to the attorney-general concerning

the person in respect of whom the application was refused, the attorney-general may again apply under subsection (1)(a) for the detention of that person.

(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in terms of an order by the attorney-general under subsection (1)(b), such person shall, pending the decision of the judge under subsection (2)(a), be taken to a place determined by the attorney-general and detained there in accordance with the said regulations.

(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless-

(a) the attorney-general orders that he be released earlier; or

(b) such proceedings have not commenced within six months from the date on which he is so detained, in which case he shall be released after the expiration of such period.

(5) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the attorney-general or an officer in the service of the State delegated by him.

(6) Any person detained under subsection (2) shall be visited in private at least once during each week by a magistrate of the district or area in which he is detained.

(7) For the purposes of section 191 any person detained under subsection (2) of this section shall be deemed to have attended the

> criminal proceedings in question as a witness for the State during the whole of the period of his detention.
> (8) ...
> (9) (a) In this section the expression 'judge in chambers' means a judge sitting behind closed doors when hearing the relevant application.
> (b) No information relating to the proceedings under subsection (1) or (2) shall be published or be made public in any manner whatever.

This is a drastic provision and applicable only to serious offences.[20] Du Toit[21] maintains that the regulations published under s 185(3) of the CPA have the effect of providing that the detained witness is to be treated in much the same way as an awaiting trial prisoner even though interrogation is not the sole purpose of the detention. To 'detain' witnesses under the conditions as set out in sub-ss (5) and (6) seems to be a harsh way of 'protecting' people who fulfil their civic duty.

The detention of witnesses in terms of this provision may last until the relevant trial has been completed, provided that if the trial has not commenced within six months of the date of detention, the witnesses shall be released. This section is a perfect example of how little protection witnesses receive in the criminal justice system in contrast to the procedural guarantees granted to an offender in terms of the Constitution. It is a severe infringement of witnesses' 'rights' that during such a detention they are held *incommunicado*. Only state officials acting in the course of their duty may have access to them and a magistrate visits them once a week.[22]

Legal representatives, or parents in the case of juveniles, cannot visit detained witnesses as of right but must first obtain permission from the Attorney-General to communicate

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[20] Some of the offences in respect of which these powers may be exercised are: murder, arson, kidnapping, child-stealing, robbery, seduction, public violence and housebreaking.
[21] Du Toit et al *op cit* 23-10.
[22] See s 185(5) of the CPA.

with them.[23]

A review of the relevant case law demonstrates that witnesses are more victimised and traumatised by this piece of legislation rather than 'protected', and that the provision in fact does not serve the interests of witnesses. In **S v Mhlongo**[24] the state intended calling four youths as state witnesses at the trial. The case concerned an incident that arose from the political violence in Natal at that time. The prosecution protected the juveniles by placing them in custody in terms of s 185 of the CPA. When called as witnesses, two of them said that they knew nothing at all about the matter before the court; the other two were not called to testify. In the end, six of the eleven accused charged with murder and arson were discharged at the close of the state case, and the other five were acquitted. Reflecting on the detention of the youths detained in terms of s 185, Didcott J made the following remarks:

> The order (under section 185) to which I referred... was made about six months ago, and the juveniles were in custody as a result throughout that period. One of
> them who testified told us that he, and two of the others, were at school when they were placed in custody. They therefore, if that is so, lost six months' schooling, which may well mean in practical terms a whole year of schooling. He said they had no books for either study or recreation, and nothing at all with which to occupy themselves, and he spoke of only three visits to them by members of their families during the six months. There was no evidence to gainsay any of this. That does not necessarily mean that it was all true. The absence of evidence to any other effect may be explained simply by the fact that nobody who had personal knowledge of the circumstances in which the juveniles were kept in custody happened to be present at court to instruct the prosecutor. And, if what the one juvenile

[23] This intolerable situation will be changed, once the provisions of the Witness Protection Act 112 of 1998 come into operation. Section 12 of the Act specifically makes provision for minors that are in need of protection.

[24] *S v Mhlongo* (DLD) Case no CC176/88 unreported decision decided 17 October 1988.

said is true, the explanation for the fact that there were not more frequent visits by members of the family may be not that no more were allowed, but that none was tried, for example, because the families were too far away to get conveniently to Pinetown. We are clearly in no position to make any positive finding on these matters. Nor indeed is it relevant to this judgement, or to any issue that requires to be decided in the case, for us to do so.

But I wish to say that, when one looks at the section under which the juveniles were taken into custody, section 185 of the CPA, I am disturbed by what I see. I fear that *the legislature may not have fully grasped the implications of some of the provisions of the section,* especially where juveniles are involved. And *it seems to me that legislative reconsideration of some parts of this section may well be necessary....* Now the whole point about the custody of a witness... is that he is put and kept in custody in his own interests, for his *own protection*. One is therefore taken somewhat aback to read in sub-section (5) that, even in the case of such a person, *nobody but an officer of the State*, acting in the performance of his official duties, *may have access to the person kept in custody*, except with the consent of and subject to the conditions fixed by the Attorney-General or someone deputed by him Then one sees in sub-section (8) that *no Court has the power to pronounce upon the refusal by the Attorney-General to give consent* to visits or to any conditions which he imposes in that regard.[25]

What on earth, one asks oneself, can be the conceivable point of the provisions of sub-sections (5) and (8) in relation to somebody who is being kept in custody for his own protection and in his own interests? Is the idea behind it, one wonders, to ensure that threats are not communicated to a person in custody by someone visiting him, or that

[25] Emphasis added.

> tampering with him is not attempted by any such person? If that is the fear, surely the way to deal with it is not to place an embargo on visits, but simply to have a policeman present throughout them. It is particularly disturbing to notice that, as the legislation stands, no parent may visit the juvenile who is in protective custody without the consent of the Attorney-General. No doubt a sensible and compassionate Attorney-General will grant such consent. But why should the access of a parent to his own child, who is in custody for the child's protection, be subject to the consent of the Attorney-General?
>
> I consider that in these respects at least serious consideration ought to be given to the section's amendment, perhaps by giving the Court a power when it grants an order for custody to do so conditionally, so that the mischief to which I have referred may be avoided, for the Court to have the power in a case like this, for instance, to authorise the custody of a juvenile on condition that he is supplied with books and studying material, on condition that he may be visited at all reasonable times by his parents and, if necessary, requiring the State to provide transport to get the parents to the place where they are held, if they do not reside in the immediate vicinity. I would have thought, to confine myself to juveniles, that the chances of getting a juvenile witness to give evidence in a relaxed, confident, comfortable way, would be greatly enhanced if, instead of being kept in the artificial circumstances in which these juveniles were, they were protected in an environment which at least approximated more to normal living at home and at school.

One cannot but agree with Didcott J that, in order to assure that fair treatment be given to all, the section needs to be amended if not repealed to give effect to the notion of fairness. The legislature has not yet repealed this section and it is therefore possible that the same

situation that occurred in 1989 could be repeated today.[26] Since the judge specifically focused on the use of s 185 of the CPA in relation to the protective custody of juvenile witnesses the following comments are made with reference to juvenile offenders. Shortly after the introduction of the Bill of Rights the legislature adopted legislation to prevent the detention of juvenile offenders[27] unless very stringent requirements are met. It is submitted that this quick response by the legislature to address the rights of offenders is indicative of government's priorities. Juvenile witnesses cannot claim the same rights as juvenile offenders and have to wait for the Witness Protection Act to come into operation to address their concerns.[28] If one compares this kind of infringement of witnesses' right

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[26] Provision is made in terms of the Witness Protection Act 112 of 1998, for this section to be repealed. This Act has, however, not yet come into operation and the state will technically be in a position to utilise s 185 of the CPA.

[27] Section 29 of the Correctional Services Act 29 of 1959.

[28] See s 12 of the Witness Protection Act 112 of 1998 that provides as follows:

(1) No *minor shall* be placed under protection without the consent of his or her parent or guardian: Provided that any minor-

(a) who, as a witness, applies for protection in respect of proceedings against his or her parent or guardian or in which his or her parent or guardian is a suspect;

(b) who has no parent or guardian;

(c) whose parent or guardian cannot be identified or found, notwithstanding reasonable efforts to do so; or

(d) whose parent or guardian is unreasonably withholding or is unable to give his or her consent, may be placed under protection without the consent of his or her parent or guardian if the Director is of the opinion that it is necessary to do so for the safety of the said minor.

(2) (a) If the Director, in the circumstances referred to in the proviso to subsection (1), places a minor under protection, *he or she must-*

(i) within seven days of such placement; or

(ii) within such further period as the Judge President of the High Court within whose area of jurisdiction the minor is domiciled or ordinarily resident, may determine in an application made to him or her in chambers by the Director, submit to the said Judge President-

(aa) a report setting out his or her reasons for such placement; and

(bb) the draft protection agreement referred to in section 11(2) (b), for consideration by a judge in chambers.

(b) The Director *must* also furnish to the minor concerned and, where applicable, to his or her parent or guardian, a copy of the report and the draft protection agreement referred to in paragraph (a).

(3) After consideration of the report and draft protection agreement referred to in subsection (2) (a), the judge may by order-

to liberty with the rights of detained juvenile accused, then it is obvious that the scale is tipped in favour of accused persons.[29]

The case of **Mhlongo** *supra* also raises other concerns. One of them is whether detainees held under s 185 of the CPA could oppose such an application by the Attorney-General where they are of the opinion that they have no relevant evidence to give, or where they want their safety to be assured in other ways than by detention.[30] In **Singh v Attorney-General, Transvaal**[31] the court considered this concern in relation to s 215 bis (1) of the old CPA,[32] the predecessor of s 185. The application was brought by the wife of the detainee on the ground that he had been arrested on an invalid warrant. She also asked the court to order the authorities to permit her to provide him with food from outside. The basic difference between s 215 bis of the old Act and s 185 of the current CPA is that under the old provision the Attorney-General decided both whether the witness would be

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(a) set aside the placement under protection;
(b) confirm the placement under protection and thereupon ratify the draft protection agreement; or
(c) confirm the placement under protection and thereupon amend the draft protection agreement in the manner which he or she deems-
(i) to be in the best interests of the minor; and
(ii) necessary to ensure the safety of the minor.
(4) If the placement under protection of a minor is set aside in terms of subsection (3) (a), the Director must forthwith discharge such minor from protection.
(5) Any draft protection agreement ratified or amended in terms of subsection (3), shall constitute a binding protection agreement.
(6) The Director shall be the curator *ad litem* of a minor who, without the consent of his or her parent or guardian, has been placed under temporary protection as contemplated in section 8 (1) or protection as contemplated in the proviso to subsection (1).(Emphasis added)

[29] See specifically s 28(1)(g) of the Constitution that provides:
Every child has the right-
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;

[30] Particularly professional people and other people who are self-employed and who cannot afford to be detained merely because they have to testify on behalf of the state.

[31] 1967 (2) SA 1 (T).

detained to give evidence and whether the detention of the witness was also necessary. According to s 185 the decision on the first question remains with the Attorney-General, but the decision on the second question must be decided by a judge.

In **Singh** *supra* the court held that the section did not prescribe criteria that have to be objectively satisfied. In fact the only criterion for the exercise of the power to detain was, according to the interpretation adopted by the court, the opinion of the Attorney-General that the prerequisites for detention had been met. Mathews[33]argues, with reference to s 215 bis, that in order to become a victim of this detention power, you need not be an actual witness to an actual offence. But you need only be thought to be a witness to an apprehended offence. Part of this argument still holds, but it should be borne in mind that s 185 is distinguishable from its predecessor in that it makes provision for the matter to be considered by a judge. It also explicitly provides that the decision regarding the necessity of the detention, should be based on information placed before the judge and provided by the Attorney-General.[34]

It is therefore ironic that Steyn CJ should state in **S v Heyman and Another**[35] that the primary purpose of the section is to further the interests of justice and those of the detainee. On the contrary, it may be said that the primary purpose or effect of the section is to assist the state at the expense of witnesses' liberty.[36] It is difficult to accept that such deprivation can be seen as conduct in the 'interests' of witnesses when the incarcerated witnesses are in fact at the mercy of the state. So even though the section may protect witnesses from elements associated with the defence it does not protect them from the

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[32] Act 56 of 1955.
[33] See Anthony S Mathews *Freedom, State Security and the Rule of Law – Dilemmas of the Apartheid Society* (1989) at 96.
[34] See sub-s 1(a) *supra.*
[35] 1966 (4) SA 598 (A) at 605. See also in this regard *Gosschalk v Rossouw* 1966 (2) SA 476 (A) at 477.
[36] This is said in the face of the *dictum* in *S v Weinberg* 1966 (4) SA 660 (A) at 667, that although interrogation during detention is not the purpose of the section, the witness may be 'asked' to make a statement. It is submitted that such 'asking' cannot be anything other but interrogation.

state. It would be relatively easy for the state to obtain evidence from detained witnesses by overt interrogation.

Whose 'interests' are served by this piece of legislation? In answer to this question it would be appropriate to consider the *dictum* by Rumpff CJ in **S v Mushimba en Andere:**[37]

> The law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the state to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection for the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.[38]

It is submitted that s 185 of the CPA cannot achieve the reconciliation that the learned Chief Justice postulates because the two interests are in most instances inherently in conflict with each other. In the final analysis it is important to consider the constitutionality of s 185 in the face of the Constitution.

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[37] 1977 (2) SA 829 (A).
[38] *Mushimba supra* at 845B-E, quoting *Lawrie v Muir* 1950 Scots C.J. 19 at 26.

The question remains whether a detention under s 185 of the CPA does not constitute detention without trial? It is my submission that such detention can be classified as detention without trial because the 'trial' referred to in the section relates to another person being charged with an offence and most certainly does not refer to the 'trial' of the detainee. In its current form s 185 of the CPA in all probability is in conflict with s 12(1)(b)[39] of the Constitution which provides that everyone has the right not to be detained without trial. It could be submitted that the provision concerns the right of an accused, but a counter argument would be that specific provision for the rights of the accused is made in terms of s 35 of the Constitution. Furthermore, s 12 of the Constitution may be claimed by all citizens irrespective of whether they are accused of a crime or whether they are detained as witnesses.[40] It is therefore submitted that the detainee, being a witness and not an awaiting trial offender, can for this very reason challenge the constitutionality of s 185 of the CPA. In addition to s 12 there is s 35(2)[41] which specifically provides for the rights of every detained person. It grants the detained person the right to challenge the validity of his/her detention in a court of law and for this reason it is submitted that the detained person can now institute action against the state and that the courts are now empowered to hear such an application.[42]

2.3.2 Detention of prospective witnesses at their request

In terms of s 185A of the CPA prospective witnesses may at their own request, be placed in detention pending the trial. They may continue to stay in custody even after they have testified. Protecting witnesses by detaining them in custody is an archaic approach that

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[39] Section 12 of the final Constitution corresponds with s 11 of the interim Constitution.

[40] In *Nel v Le Roux and Others* 1996 (1) SACR 572 (CC) at 574d-e, the court held that the 'trial' that is envisaged by s 11(1) of the interim Constitution, does not in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25 of the Constitution.

[41] The specific subsection that is relevant is 35(2)(d) that reads as follows:

> (2) Everyone who is detained, including every sentenced person, has the right...
>
> (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful to be released;

[42] Access to the court has also been made easier after s 185(8) was repealed by s 69 of Act 88 of 1996.

places a heavy burden on witnesses in the exercise of their civic duty. Protection of witnesses is of fundamental importance to the successful operation of the criminal justice system as a whole. The kind of treatment that witnesses receive influences both whether they will be prepared to come forward to testify and whether they will do so with dedication. The protection afforded to witnesses in terms of s 185 or s 185A of the CPA is inadequate and an inappropriate way of obtaining the co-operation of witnesses. It is fortunate that this view was shared by the legislature, which has recently acknowledged the inadequacy of s 185A and which has legislated to repeal this archaic provision.[43]

It is foreseen that the approach to witness protection will change once the Witness Protection Act[44] comes into operation.[45] In terms of this Act all decisions regarding witness protection will be taken by the Director of the Office for Witness Protection, appointed by the Minister of Justice.[46] The Act is a vast improvement on s 185A. It will streamline the protection services and bring about a centralised structure to co-ordinate witness protection and set a uniform protection policy for all witnesses. For the sake of fairness and certainty it has become essential to have a uniform standard that applies to all witnesses and which will ensure that all witnesses in the process will be treated alike. In the past exceptions were made for a few witnesses to be protected at 'safe houses' or hotels instead of being detained at police cells.[47] Hitherto this privilege was mainly offered to witnesses that had to testify in political trials.

The provisions of the Witness Protection Act will remain mere rhetoric unless there are sufficient funds to set up the structures provided for by the Act. In 1995 the overall cost pertaining to witness protection, including the protection of the witnesses of the Goldstone Commission, was R2 011 834.[48] This amount had increased to R20 million in 1997.[49] If one considers the fact that in 1995 40 witnesses were protected, and that in

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[43] See s 24 of the Witness Protection Act 112 of 1998 that provides for such repeal.
[44] Act 112 of 1998.
[45] See 'Witness protection modernised' *The Cape Argus* 24 February 1998 at 9.
[46] See s 3(1) of the Witness Protection Act.
[47] See 'Duisende bestee aan Magnus getuie' *Die Burger* 10 June 1996 at 8.
[48] See Annual Report of the Department of Justice 1994/1995 para 2.157.
[49] See 'Violence witnesses shun protection' *Mail and Guardian* 30 September 1997 at 6.

1997 the number of witnesses increased to a total of 473, then it should be obvious that more money will have to be allocated to the Department of Justice to run the programme. Witnesses that did not want to enter a protection programme in the past because it would separate them from their families and expose their families to danger, no longer need have such fears because the Act provides for both witnesses and their relatives to enter the protection programme.[50]

It is submitted that the kind of protection afforded by the Witness Protection Act is required in order to assure witnesses that they may not have to pay the ultimate price in coming forward to testify.[51]

2.4 Protection of witnesses' identity

During the course of a trial the state may apply, in terms of s 153 of the CPA, for a direction that the evidence of certain witnesses be given *in camera.*[52] In the matter of **S v Leepile and Others(4)**[53] it became evident that even though the section provides for the residential addresses of witnesses to be withheld from the accused in certain circumstances, the courts are reluctant to make such orders.

In this case the Court found that there was a high risk of harm to the witness if she was to give evidence in an open court and that she should be given meaningful protection by an order that the matter be heard in a closed hearing. The Court was however not prepared to

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[50] See s 7 of the Witness Protection Act. Section 7 should be read with s 1(xx) of the Act that provides as follows:

> 'related person' means any member of the family or household of a witness, or any other person in a close relationship to, or association with, such witness.

[51] See 'Man convicted of killing state witness' *The Cape Argus* 13 June 1996 at 3.

[52] Section 153(1) of the CPA provides for such direction when it is in the interest of the security of the State; s 153(2) provides for the direction that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary, and that the identity of such person shall not be revealed; whereas s 153(3) provides for such a direction when a certain class of offences were committed or where the offender is a minor.

[53] 1986 (3) SA 661 (W).

order that her name be withheld from the accused.[54] The Court maintained that it would be unconscionable to require a legal representative to withhold from his client information, particularly if it were to appear that such information is relevant to the proper conduct of the defence. To grant an order under such circumstances would seriously harm the relationship between the accused and his legal representative.

In the matter of **S v Leepile and Others(5)**[55] another application was lodged in terms of s 153(2) of the CPA but what was peculiar about the application was that the state requested that the true identity of the witness not be disclosed to anyone. In considering the request by the state, Ackermann J was of the opinion that what the state was requesting was something that had far more consequences for the accused than an *in camera* hearing with its restriction on the publication of the witness's identity. He stated that the following consequences might flow from such an order and affect the accused:

> (a) No investigation could be conducted by the accused's legal representatives into the witness' background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general.
> (b) It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him.
> (c) It would further heighten the witness' sense of impregnability and increase the temptation to falsify or exaggerate.[56]

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[54] It is important to present the following facts so that there can be a clear picture about how little protection was given to the witness, Miss B. In the application Miss B testified how she had left the Republic in 1978 and had become a member of the ANC. She stated that her studies outside the Republic had been sponsored by the ANC and that she was trained, which included military training, by the ANC. She had worked for the military wing of the ANC until she was arrested in the Republic on a mission in 1984. Thereafter she had acted as an informer for the South African Police. It was for these reasons that she was in a high-risk category as far as the likelihood of harm to herself was concerned. In the light of these facts the court was convinced that Miss B's safety was at stake and ordered that her testimony be heard behind closed doors, but it did not order that her address be withheld from the accused or their legal representatives.

It was decided not to grant the order requested by the state, namely absolute anonymity of the witness. The court held that neither the provisions of s 153 nor those of s 65 of the Internal Security Act[57] could be interpreted to grant witnesses true anonymity. Ackermann J in the matter of **S v Leepile(1)**[58] considered the primary object of s 153(2) to be to ensure that justice is done and not to protect witnesses.[59]

In another political trial, **S v Pastoors,**[60] an application was lodged in terms of s 153 (2) of the CPA to allow the witness to testify behind closed doors.[61] In his consideration of the application Spoelstra J carefully considered the law on this aspect. He considered the following principles as important factors in an application of this kind:

> 1. All trials are heard in open Court accessible to any member of the public who wishes to attend. The reasons for this principle are fully discussed in the judgment of Ackermann J.[62]
> 2. A court would encroach upon this general rule only where special circumstances are present requiring such an inroad to secure the proper administration of justice or where a public trial is prohibited by statute, for instance where minors are involved.
> 3. The *onus* of satisfying the Court that such special circumstances are present rests upon the party who alleges such circumstances and who brings an application that the basic rule be dispensed with.

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[55] 1986 (4) SA 187 (W).
[56] *Leepile(5) supra* at 189E-G.
[57] Act 74 of 1982.
[58] 1986 (1) SA 333 (W).
[59] See *S v Sekete and Others* 1980 (1) SA 171 (N) for further reference on the factors to be considered in an application in terms of s 153(2).
[60] 1986 (4) SA 222 (W).
[61] For purposes of this study emphasis will be placed on the different criteria that played a role in the trial of Hélène Pastoors and not the political debate that ensued at the time of the trial around Pastoors as a foreign national. See C van den Wyngaert 'Criminal justice in South Africa: An European perspective. An observer's report on S v Pastoors' (1986) 2 *SAJHR* 278.
[62] This is with reference to Ackermann J's judgment in *S v Leepile and Others(1)* 1986 (2) SA 333 (W).

> 4. A court has a discretion in a matter of this kind to dispense with the basic rule if an applicant satisfies the Court that the prescribed jurisdictional facts for the exercise of a discretion in terms of section 153(2) are present, that is that there is a likelihood that harm may result to a person if he testifies at the proceedings.[63] The harm may take any form and the nature thereof is one of the considerations which would be considered in exercising the discretion conferred by the section.
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> 5. The expression 'a likelihood that harm may result' means a reasonable possibility of such harm and not a probability on the one hand or a remote or far-fetched or fantastic one on the other.
>
> 6. If such likelihood that harm may result to any other person, other than the accused, is shown, the Court has a discretion to make a direction in terms of s 153 (2)(a) and (b), or to refuse to accede to the request.
>
> 7. Where a reasonable possibility of harm has been established, and whether or not the Court should exercise its discretion in favour of the applicant, are questions of fact[64] to be decided on the facts and circumstances of each particular case.[65]

In the matter of **S v Baleka(2)**[66] the state succeeded in its attempt to offer the witness some protection in applying s 153(2).[67] In **Baleka(2)** the state applied for an order to be

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[63] Cf. *S v Madlavu and Others* 1978 (4) SA 218 (E) and in particular the passage at 222F-G, where Cloete JP said:

> I have come to the conclusion after a careful consideration of the section and the authorities to which I have referred that in making an order in the terms contemplated in s 153(2) the prerequisite is that the harm to any person who testifies in these proceedings as envisaged by the section must be a reasonable possibility and not a remote far-fetched or fantastic one. The requirement is not to be set so highly that a probability must exist that harm will result.

[64] With regard to whether harm might result, Van Dijkhorst J said in *S v Baleka(2)* 1986 (4) SA 200 (T) at 201I:

> Whether there is a likelihood that harm might result to a witness will vary from case to case and witness to witness. A court can only be guided in its decision on this point by the material placed before it.

[65] *S v Pastoors supra* at 224B-G.

[66] 1986(4) SA 200 (T).

[67] See *S v Nzama and Another* 1997 (1) SACR 542 (D) where the court held that the

made (a) that the evidence of the witness be heard *in camera*, and (b) that the identity of the witness not be made public. The Court in its consideration of the application bore in mind the principle set out in s 152 of the CPA (i.e. that the courts are open to the public and should always be so, except in exceptional circumstances) as well as the reasons underlying that principle. But the Court also considered that justice must be done and that when these two principles conflicted with each other the former would have to yield to the latter. The Court granted the application in terms of s 153(2) of the CPA and ordered that the witness testify *in camera* and that his identity not be made public.[68]

As previously stated, sub-ss 153(4), (5) and (6), provide some safeguards for young witnesses not to be adversely affected by criminal proceedings. No person other than the accused or his parent or legal guardian or legal representative may be present at the trial of a person under 18 years of age without special authority from the presiding magistrate. Once the public has been excluded from a trial in terms of s 153, special circumstances should exist before such a ruling will be overturned.[69]

In **S v Manqina**[70] the state applied for an order that four eye-witnesses be allowed to testify *in camera* in terms of s 153(2) and argued that the trial had political undertones which, together with threats of harm, justified the granting of such an order.[71] Friedman

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witness could adopt a pseudonym for the purposes of the trial; and that the identity of the witness not be revealed.

[68] Van Dijkhorst J held in *Baleka supra* at 201G, that the following instances are exceptional and may dictate that a trial should be heard *in camera*: 'state security, good order, public morals or the administration of justice.'

[69] *S v Mothopeng* 1979 (4) SA 367 (T).

[70] 1994 (2) SACR 692 (C).

[71] The facts of the case are briefly that the three accused were charge with the murder of Amy Biehl, an exchange student from the United States of America, in Guguletu on 25 August 1993. The evidence adduced by the State revealed that as the deceased was driving along a public road in Guguletu, a brick was thrown at her car by a group of people who were standing at the side of the road and who were stoning the car. She managed to stop the car whereafter she was stabbed and attacked by the group and died shortly thereafter. The four eye-witnesses who wanted their identity to be protected were not passengers in the car of the deceased but saw what happened to her on that day. It was submitted during the trial that the accused were members of a political organisation, the Pan African Congress.

JP held that the state had not succeeded in proving the necessary jurisdictional facts and refused to grant the order. In his interpretation of the different subsections of s 153 of the CPA, Friedman JP concluded that the *quantum* of proof required for establishing the jurisdictional facts for the purposes of s 153(1) is far greater than that required under s 153(2). He finally granted the witnesses the opportunity to testify without revealing their identity. They were allowed to testify *in camera* but in terms of s 153(1) and not s 153(2). He exercised his discretion by weighing two important principles against each other: on the one hand, the fundamental importance of trials taking place in public, and on the other hand, the chief function of the courts, namely to ensure that justice is done.[72] This decision proved that courts could grant a reasonable amount of protection in terms of this section to witnesses in situations of feared intimidation and harm.

From the above discussion it should be clear that s 153 of the CPA is a useful tool in the protection of the identity of witnesses but that the courts are not consistent in affording such protection in terms of the provision. Such inconsistency has a negative impact on witnesses. The fact that they have to rely on a court's discretion to be exercised in terms of this provision leaves them with a certain sense of uncertainty.

As yet this section has not been challenged on constitutional grounds but it is reasonable to suppose that the section is at risk.[73] This view is supported in view of the approach adopted in other adversarial systems where there is greater emphasis on the offender's right to a public trial.[74]

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[72] *Manqina supra* at 704G-I.

[73] See s 35(3)(c) of the Constitution which provides for the rights of the accused person, and reads as follows:

> Every accused person has a right to a fair trial, which includes the right –
>
> (c) to a public trial before an ordinary court.

[74] For example the Sixth Amendment to the Constitution of the United States of America, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy *public* trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.(Emphasis added)

It is also quite evident that the courts are not over-zealous to grant an order in terms of s 153[75] and that if witnesses have to rely only on this section for their protection or for the non-disclosure of their identity then they may very well be without any protection at all. Witnesses would be accorded more protection by the system if they [76]could claim non-disclosure of their identity in circumstances of real fear and intimidation as of right.

[75] See *S v Yengeni and Others* 1990 (2) SACR 248 (C) at 252c-e, for reference to the kind of protection that s 153(2) offers. It should however be borne in mind that Selikowitz J was dealing specifically with the protection offered to witnesses that no longer wanted to testify on behalf of the state.

[76] See also recommendation 6.2.1 *infra*.

Chapter 3

3. The treatment of witnesses in the witness box

3.1 The vulnerability of witnesses in an accusatorial system

To understand the vulnerability of witnesses whilst testifying, it should be recognised that trials in an overwhelmingly accusatorial system[1] involve adversaries and adversity, defeats and victories. It is safe to say that the heart of the accusatorial method of truth-seeking is cross-examination:

> The purpose of cross-examination is to weaken the testimony the witness has given, or, at best, negate it, or, less spectacularly but highly useful, to do more than clarify ambiguous responses. The cross-examiner seeks to show inadequacy of observation, confusion, bias, inconsistency, even contradiction. The dramatic interest, of course, arises mainly from the contest between the witness bent on maintaining his position and a lawyer bent on destroying it. The audience, at a real trial or a fictional one, loves the plangent clash and wants to see the witness bleed, or the lawyer bleed, or even better, both. The contest can be good-humored, or at least courteous, but it is often drenched in hostility. The cross-examined witness is typically a cross-examined witness. The fight is fine; it suits the

[1] South Africa follows an accusatorial trial system as opposed to an inquisitorial trial system. As regards the principal features of the different systems of legal proceedings see J Hermann 'Various Models of Criminal Proceedings' (1978) 2 *SACC* at 3-19. Cf. C R Snyman 'The Accusatorial and Inquisitorial Approaches to Criminal Proceedings: Some Points of Comparison between South Africa and Continental Systems' (1975) VIII *CILSA* at 100-111; M Damaska 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1972) 121 *University of Pennsylvania LR* 506 especially at 583.

> adversary system. But it should stay cool, and its function kept in mind. Petty triumph is not the goal...[2]

On the one side of the battlefield the state will be faced with the task of proving beyond a reasonable doubt that a specific crime was committed by a specific person, and in fulfilment of the task, the state will have to call upon witnesses to give evidence to that effect. On the other side, however, the defence will make it their business to cast doubt on the allegations made by the prosecution witnesses in order to discredit them. In a way a trial is nothing but a succession of systematic endeavours to test the veracity of statements made by witnesses in court. The problem with this contest, however, is that the rules of the contest do not always provide sufficient protection to all the players. In the matter of **Rex v Hepworth**[3] Curlewis JA defined the role of all parties concerned in the following words:

> A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.[4]

It is in this context that cross-examination[5] should be examined. The significance and importance of cross-examination in the system can be based partly on our common law evidential system that attaches greater value to oral evidence in court than to earlier recorded statements.[6]

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[2] Charles Rembar *The Law of the Land: The Evolution of our Legal System* (1980) at 337.
[3] 1928 AD 265.
[4] *R v Hepworth supra* at 277.
[5] See M N Howard *Phipson on Evidence* 14 ed (1990) at 245 who describes the object of cross-examination as being twofold: 'to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses.'
[6] See generally Schwikkard et al *op cit* at 295-296.

Before witnesses will be exposed to cross-examination they will have to enter the witness box and swear on oath to tell the truth.[7] If witnesses do not want to take the oath, they may solemnly affirm to speak the truth.[8] The vulnerability of witnesses is particularly enhanced by the fact that they are exposed and subjected to cross-examination, once they have entered the witness box and testify. In this discussion it will be demonstrated that cross-examination is indeed necessary and almost indispensable as a tool to show that the testimony of witnesses are unreliable and untruthful. Moreover without competent and effective cross-examination in a trial, it will be impossible for a court to make any credibility findings on the evidence of witnesses.[9] In **Klink v Regional Court Magistrate**[10] Melunsky J emphasises this in the following words:

> Cross-examination is a powerful weapon: it may, and often does, play an important part in the decision of a trial court. The effect of a telling and efficient cross-examination should not, therefore be underestimated.[11]

3.1.1 Witnesses' liability to be cross-examined

Once state witnesses are in the witness box, the defence is entitled to cross-examine them.[12] Although cross-examination is regarded as an essential method to ensure a fair

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[7] See s 162 of the CPA. As regards the purpose of administering the oath to a witness in a criminal trial Van Winsen J in *S v L* 1973 (1) SA 344 (C) at 347H said that its purpose is:

> '...om deur 'n beroep op 'n persoon se gewete en sy godsdienstige oortuiging en met behulp van strafregtelike sanksies te probeer verseker dat slegs die waarheid in die volle sin van die woord deur getuienis in die howe verkondig word.'

See also *S v Bothma* 1971 (1) SA 332 (C) at 336H-337A; *S v Munn* 1973 (3) SA 734 (NC) at 736H.

[8] See s 163 of the CPA. It is submitted that s 163 and 162 can apply only in instances where a witness has the capacity to understand and assume the religious obligations of the prescribed oath. Moreover, the capacity to distinguish between the truth and falsity is considered to be a prerequisite for the making of an affirmation or an admonition in terms of s 163 and 164 of the CPA. See *Henderson v S* (1997) 1 All SA 594 (C) at 597d-g.

[9] See SA Law Commission Project 73: *Interim Report on the Simplification of Criminal Procedure* (1995) at 103. Cf. *R v Witbooi* 1960 1 PH H100 (ECD); *R v Khuzwayo* 1961 1 PH H118 (N).

[10] 1996 (3) BCLR 402 (SE).

[11] *Klink supra* at 409J-410A.

trial, it is the application of the procedures adopted during the trial that are not above criticism. To put it in context: witnesses are compelled to answer each and every question put to them in cross-examination, provided that the question is relevant[13] to the issue. The only time that witnesses will be excused from answering questions of the defence is when they are protected by privilege.[14]

3.1.2 The role of cross-examination in criminal proceedings

The right to cross-examination and the various rules regulating cross-examination can be traced back to the emergence of legal representation in the English trial in the 18th century.[15] What is cross-examination?[16] It is submitted that it can be defined as the

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[12] See s 166 of the CPA, which grants the prosecutor and the accused the right to cross-examine any witness. The accused is also protected by s 35(3)(i) of the Constitution, which grants him the right to adduce and challenge evidence.

[13] To put the vulnerability of witnesses in perspective: their character is something that is always relevant to their credibility and which may be attacked by the defence during cross-examination. For a discussion of the examination of a witness's character during cross-examination, see also J P Pretorius *Cross-Examination in South African Law* (1997) at 208.

[14] See Howard *op cit* at 242.

[15] See G A Barton 'The Effect of the English Revolution on Criminal Procedure' 1984 *De Rebus* 200.

[16] The most famous definition given is certainly that of Wigmore who defined it as the greatest legal engine ever invented in discovering the truth. See Wigmore *op cit* para 1367. Cf. *S v Magwanyana and Others v Standard General Insurance Co Ltd.* 1996 (1) SA 254 (D) for reference, and discussion of Wigmore's view. Broome DJP in *Magwanyana* deals with it as follows:

> The effectiveness of cross-examination in the search for the truth is something which has been proclaimed by a number of writers. *Wigmore* referred to cross-examination as the 'greatest legal engine ever invented for the discovery of the truth'. Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 456 observed tersely that *Wigmore* probably never saw the engine in action in a South African Court in a case in which the witness speaks in Afrikaans counsel English and the accused understands nothing but Xhosa. I would add to this that *Wigmore* certainly never saw in action some of the pathetic and often unduly protracted attempt at cross-examination that courts in this country have all too often to endure.(At 257H-258B)

Another opinion regarding the function of cross-examination is stated by Coleman. He considers it to be the method of eliminating and reducing any false conclusion at the end of the trial. See G Coleman *Cross-examination - A Practical Handbook* (1970) at 5.

method by which a party to an action probes the knowledge, recollection, bias and credibility of an adverse witness.[17] More in context, it is the process whereby the defence seeks: (a) to test the veracity and accuracy of the evidence in chief, given by the witness for the state; and (b) to elicit from the witness any relevant facts which may be favourable to the case for the defence.[18]

Witnesses may therefore be led and to a certain degree pushed or persuaded into positions contradicting their previous testimony or previous statements made to the police. The techniques used by cross-examiners to obtain a desired result are many and varied.[19] In fact any question may be asked in cross-examination as long as it is directed at exposing the errors, omissions, inconsistencies and improbabilities in their testimonies.[20] This is not a difficult task if one bears in mind that much depends on the witness's knowledge of the facts, his intelligence, his interest or disinterest at the time of the event, his integrity and veracity.[21]

One universal technique used by conscientious cross-examiners which illustrates that witnesses are at risk of contradicting themselves by merely getting into the witness box is the technique of 'fencing'. By using this technique a witness is led into the area of attack and surrounded with his own answers until he has no opening through which to escape when the critical question is finally asked.[22] If this is done thoroughly and if the witness

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[17] Paul B Weston et al *Criminal Evidence for Police* (1995) at 54.
[18] See Peter Murphy *Murphy on Evidence* 5 ed (1995) at 470-479.
[19] According to expert cross-examiners there are three primary areas of attack: perception, memory and candour. See generally Paul B Weston et al *The Administration of Justice* (1980) Chapter 9.
[20] See I M Hoffmann *Handy Hints on Legal Practice* South African ed (1997) at 170 stating the following as the main objectives of practitioner's cross-examination:

1. To destroy or weaken the force of the evidence against your client by the witness. This assumes that the witness's evidence is incorrect or incomplete but not deliberately false.
2. To elicit something in your client's favour which the witness has omitted.
3. To discredit the witness by showing him or her to be untrustworthy of belief. This assumes that his or her evidence is deliberately false.

[21] See generally Howard *op cit* at 251.
[22] See generally Weston et al *op cit* at 55 for a discussion of this technique.

is insecure, the question will call for an answer which clearly shows the witness's lack of perception, or recollection.

In an attempt to depict the vulnerability of witnesses in this 'gladiator's contest' I will refer specifically to those witnesses and victims that have to give testimony concerning an offence that is sexual in nature.[23] In the first instance the victim is required to relate in open court, in graphic detail, the particular abusive acts perpetrated upon him or her. This occurs in the presence of the alleged perpetrator. Thereafter the victim of the abuse is subjected to intensive, and at times protracted and aggressive, cross-examination by an accused or his legal representative. Experience has shown that this process instils fear, anxiety and high levels of stress amongst witnesses. Witnesses are on their own once they are cross-examined by the defence because neither the prosecutor nor the presiding officer can intervene or curtail the cross-examination exercised by the defence unless it exceeds the boundaries of justifiable cross-examination. Witnesses are isolated and very vulnerable in the circumstances. Studies[24] have shown that witnesses experience this questioning as a further victimisation which may, consequently, be as traumatic and as damaging to the emotional and psychological well-being of these witnesses as the original victimisation. It is for these very reasons, that various jurisdictions, including South Africa, have introduced procedures and mechanisms to facilitate the reception of the evidence[25] of young witnesses[26] in proceedings like sexual offences and other offences.

3.1.3 Control of cross-examination

Can an abuse of the process be limited or controlled? A review of the case law concerning the control of cross-examination reveals ironically that unfair cross-examination is primarily aimed at accused persons. This does not mean that witnesses other than the accused are not subjected to aimless, lengthy, rude and sometimes tedious

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[23] Offences like rape, incest, indecent assault, sodomy and *crimen iniuria*.
[24] See A Allan 'Psigiese Gevolge van Verkragting' (1993) 6 *SACJ* 186 at 186.
[25] See s 170A of the CPA.
[26] For a discussion of the treatment of young witnesses see chap 6 *infra*.

cross-examination.[27] Wigmore[28] mentions with regard to the abuses of cross-examination that it can be remedied by proper control. In our criminal justice system this control can be exercised only by presiding officers.

Presiding officers have a discretion to properly control and protect[29] witnesses whilst being cross-examined. No party should therefore be permitted to intimidate any witness.[30] In an accusatorial system, like South Africa's criminal justice system, it is expected of presiding officers to play a neutral role during the trial which, in conjunction with the principle that every accused person has a right to challenge evidence[31] in court, leaves little room for such officers to restrain 'undue' cross-examination. Whilst in theory[32] officers may limit offensive, humiliating and tormenting cross-examination, in practice it is no easy task to do so. There is a fine line between admissible harsh cross-examination and inadmissible abusive cross-examination. Hence the cautious approach of presiding officers not to limit the defence in the exercise of their right to cross-examination. A denial of this fundamental procedural right will, almost without exception lead to the finding being set aside[33] on appeal.[34] It goes without saying that once an officer is exercising his/her discretion that it should be exercised judiciously and with due consideration of the important function of cross-examination throughout the process.[35]

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[27] See Wigmore *op cit* para 1367 in which he refers to the 'abuses, the mishandlings and the puerilities which are so often found associated with cross-examination'.
[28] *Ibid.*
[29] See *S v Booi* 1964 (1) SA 224 (E) at 227H; *S v De Vos* 1964 2 PH O 20(G); *S v Azov* 1974 (1) SA 808 (T); *S v Gidi and Another* 1984 (4) SA 537 (C); *S v T* 1986 (2) SA 112 (O); *S v Tswai* 1988 (1) SA (C) at 858-859.
[30] See *S v Hendricks* 1997 (1) SACR 174 (C) at 177g-j.
[31] See s 35(3)(i) of the Constitution.
[32] For the powers of the court see s 166(3) of the CPA.
[33] It is submitted that such a ruling must first be considered as irregular before an appeal court will intervene. Cf. *Distillers Korporasie v Kotze* 1956 (1) SA 557 (A); *R v Ntshangela* 1961 (4) SA 592 (A); *S v Green* 1962 (3) SA 886 (A); *S v Nomtwana* 1961 (4) SA 174 (E); *S v Makaula* 1961 (4) SA 600 (E); *S v Cele* 1965 (1) SA 82 (A).
[34] For appeals see generally sections 309-320 of the CPA.
[35] See *R v Hepworth* 1928 AD at 265:

> A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice he is not merely a figure head

In **S v Hendricks**[36] Van Reenen J relied on **S v Gidi and Another**[37] in setting the limits of cross examination:

> A prosecutor should not bully an accused by insulting him, brow-beating him or adopting an overbearing attitude which admits of no contradiction by the accused of what is put to him. A prosecutor should not unnecessarily ridicule an accused or taunt him or offend his sensibilities or provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering questions to the best of his ability. In the case of many a witness it calls for no skill to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor. Conduct of this kind offends against good manners, politeness and humanity. That is sufficient reason for refraining from such unseemly behaviour.[38]

One need not be a lawyer to know and understand that the tactics mentioned in the case of **Hendricks** are in fact a negation of the object and purpose of cross-examination. Bullying interrogation is not directed at an enquiry into the true facts, but is calculated to intimidate a witness into fearful or hopeless concessions or admissions, which may be untrue. Such examination may even prevent a witness from having an opportunity to supply a plausible explanation of some circumstance or circumstances for which there may be a logical or mitigating reason. Justice demands that witnesses be given a fair opportunity to answer questions put to them and courts should intervene if their answers are interrupted from the bar. Fair and just conduct of the trial should dictate that

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he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

[36] See *supra* n30.

[37] 1984 (4) SA 537 (C).

[38] In *S v Gidi and Another supra* Rose-Innes J considered the duties of a cross-examining prosecutor at 539F-541B.

subsequent questions not be posed before previous ones have been fully answered. In this regard it might be helpful to bear in mind the remarks made by Snyman J in **S v Azov:**[39]

> I think it must be made clear to him, and perhaps to others, that witnesses who come into court, be they police witnesses or any other kind of witnesses, are entitled to the ordinary courtesy one extends to decent people. Witnesses who give evidence are assisting the court in arriving at the truth and carrying out the administration of justice. No cross-examiner is entitled to insult a witness or to treat him in the manner in which these witnesses were treated, without there being a very good reason for it. Witnesses must be treated with courtesy and respect. They are doing their public duty in coming to court. That must be borne in mind by cross-examiners and by presiding officers. It was clearly the duty of the magistrate here to protect these witnesses. I do not wish to be understood to say that a witness may never be attacked, but before you can attack a witness you must at least lay a foundation to the satisfaction of the presiding officer that you have grounds for attacking the witness. Otherwise witnesses must be treated with respect and with the same courtesy that you would extend to a man in a civilised society.[40]

Considering the nature of cross-examination and the limited protection afforded to witnesses it is regrettable that witnesses have to rely on the goodwill of presiding officers in deciding whether the line of cross-examination is fair towards them.[41] The passive conduct demonstrated in the past by presiding officers when dealing with abuses in the system does not encourage witnesses to come forward and testify. The report of the Hoexter Commission[42] pointed out that abuses in the system continue to exist and were on the increase:

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[39] 1974 (1) SA 808 (T).
[40] *S v Azov supra* at 810-811.
[41] See *S v Nkilmine* 1989 (2) SA 421 (NC).
[42] See *Fifth and Final Report of the Commission of Inquiry into the Structure and Functioning of the Courts* RP 78/1983.

> Many witnesses drew the attention to the abuse of cross-examination in trial cases. Rambling, pointless and repetitious cross-examination not only considerably prolongs the trial, but if the decision of the trial court is appealed against, also makes the record of proceedings voluminous and exorbitantly expensive. The Commission is convinced that in the face of an increasing tendency towards inordinate and improper cross-examination *trial courts display altogether too much forbearance.*[43]

It is submitted that despite the findings of the Commission the abuses still occur and witnesses are not in an improved position despite the enactment of s 166(3) of the CPA.[44] The subsection provides as follows:

> (3)(a) If it appears to a court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination.
> (c) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

The amendment addresses some of the concerns raised by the Commission but fails to protect witnesses sufficiently. Some protection is also given to witnesses through the bar rules[45] of advocates, which are rules that are binding upon them as members of the profession.[46] Non-compliance can be sanctioned by removal from the roll of advocates.

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[43] *Op cit* Part II para 6.3.5.5 at 173-174. (Emphasis added.)
[44] Subsection (3) has been added by s 8 of Act 86 of 1996.
[45] These rules are rules of professional conduct as adopted by the General Council of the Bar. See W A Joubert (ed) *The Law of South Africa* Vol 14 First Re-issue (1999) para 258-262 for a discussion of the rules applicable to advocates.
[46] England and Wales, for example, have similar codes to regulate cross-examination. Thus the Code of Conduct of the Bar of England and Wales lays down the rules for the conduct of cross-examination by barristers and provides as follows:

Important for the purposes of this discussion is that where an advocate has no belief in the truth of an assertion and has no evidence to support an assertion that he wants to make to a witness, then he is not entitled to put such an assertion to a witness during cross-examination.[47] In a similar vein, questions regarding a witness's character should not be asked unless relevant to the actual enquiry.[48] These rules are, however, only binding on members of the bar and do not bind the majority of legal practitioners that

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22.4.1. A barrister must exercise personal judgement upon the substance and purpose of questions asked and statements made. He is personally responsible for the conduct and presentation of his case in Court.
22.4.2. A barrister must guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or some other person.
22.8.1. A barrister may only suggest that a witness is guilty of fraud, misconduct or crime if such allegations go to a matter in issue which is material to the client's case. Where the only such matter is credibility of the witness the barrister must be satisfied as to the reasons for such allegations being made and that they are supported by reasonable grounds. A barrister may regard instructions from his professional client that such allegations are well-founded as reasonable grounds to support such allegations; but he may not only rely on a statement from any other person unless he has ascertained so far as is practicable that the person can give satisfactory reasons for his statement.
22.8.2. A barrister may not in cross-examination attribute to another person the crime with which his client is charged unless he can do so in accordance with the principles set out in par 22.8.1. Neither may he do so in any other part of the trial, unless there are facts or circumstances which reasonably suggest the possibility that the crime may have been committed by the person to whom the guilt is imputed.
22.9. A barrister may not impugn a witness by assertion in a speech unless in cross-examination he has given the witness the opportunity to answer the allegation

[47] See Bar rule 3.3.4 that reads:

Such questions, whether or not the imputations they convey are well-founded, should only be put if, in the opinion of the cross-examiner, the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect the credibility of the witness, the question should not be put.

[48] See Bar rule 3.3.1 that reads:

Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation is well-founded or true.

conduct cases in lower courts, namely attorneys. Attorneys have to obey the rules of their respective law societies, which are empowered to make rules that bind attorneys within the respective provinces. These rules, however, are not all the same: they vary in the extent and manner in which misconduct is prescribed by each law society.[49] The rules of the Cape Law Society for example, do not regulate cross-examination in as much detail as the Bar Council rules do.[50]

Witnesses cannot be assured that conduct by an attorney, regarded as improper in the one province will necessarily be regarded similarly in another province. Not only are the two branches of the profession governed by different rules, but also the different law societies are entitled to issue different rules for practitioners in each of their jurisdictions. It is submitted, from the perspective of witnesses, that their interests would be better served if only one code of conduct existed, binding all members of the legal profession[51] and prescribing to all practitioners, irrespective of whether they practice as advocates or attorneys, proper conduct towards witnesses in court.

Finally, one has to look at the constitutional implications of curtailing the accused's right to challenge evidence in court. It is foreseeable that an accused may allege that his fair trial rights have been violated if a presiding officer hampers him in the manner that he conducts his cross-examining. Should this occur, it is contended that it should not be open to an accused person to aver that his right to a fair trial has been infringed if the

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[49] See W A Joubert *op cit* para 393 – 400 for a discussion of professional misconduct of attorneys.

[50] The Cape Law Society Rules in terms of Rule 14.3, for example, provides that members should at all times conduct themselves in the following ways:

> 14.3.1 maintain the highest standards of honesty and integrity;
> 14.3.2 treat the interests of their clients as paramount, provided that their conduct shall be subject always to-
> > 14.3.2.1 their duty to the court;
> > 14.3.2.2 the interests of justice;
> > 14.3.2.3 the observation of the law;
> > 14.3.2.4 the maintenance of the ethical standards prescribed by this rule and generally recognised by the profession.

[51] For unprofessional or unworthy conduct of attorneys, see s 71 of the Attorneys Act 53 of 1979.

court intervenes to prevent his representative from conducting a bullying or intimidating form of cross-examination nor if it appears that his line of questioning is calculated to confuse the witness. It seems to be reasonably clear that a determination of whether a curtailment or limitation of cross-examination has resulted in the negation of the right to a fair trial, will depend upon the circumstances of each case.[53] This proposition brings me to the submission that although witnesses may not be entitled to any rights in terms of s 35 of the Constitution, they may as ordinary citizens claim their right to human dignity.[54] Abusive cross-examination may indeed impair witnesses' rights to dignity. Courts therefore need to be more considerate of the fact that a number of rights come into play when they regulate the exercise of cross-examination, and should not be overeager in the protection of only the offender's rights. Justice requires that magistrates and judges should overcome their present reluctance to exercise 'control' over abusive cross-examination in order to make the trial process more fair for witnesses.

3.1.4 Privilege attaching to witnesses' statements

One method that was until very recently employed by the state in protecting state witnesses was to claim privilege in respect of the statements of these witnesses. The state could at least endeavour to protect witnesses called upon to testify in a criminal trial, by not disclosing the statements made to the police by these witnesses.[55] Such non-

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[52] Howard *op cit* at 248.

[53] See *Douglas v Alabama* 380 US 415 (1965). In the aforementioned matter the state submitted a statement made by the co-accused even though the witness refused to acknowledge the correctness of the statement. The witness exercised his privilege against self-incrimination and refused to co-operate with the state. This conduct in essence denied the defence the opportunity to challenge his testimony and was considered to be an infringement of the defendant's right to confront the testimony as provided for in terms of the Confrontation Clause of the Sixth Amendment.

[54] See s 10 of the Constitution that provides as follows:

> Everyone has inherent dignity and the right to have their dignity respected and protected.

[55] Prior to constitutionalisation, it was generally accepted that the state had a 'blanket docket privilege' in terms of which statements obtained for purposes of a criminal trial were as a rule privileged from disclosure. See *R v Steyn* 1954 (1) SA 324 (A) and discussion by the authors of Schwikkard et al at 137-138.

disclosure has been referred to as docket privilege.[56] The effect of the privilege was to afford some protection in not disclosing their statements to the defence.[57] Such non-disclosure can no longer be claimed in respect of state witnesses' statements due to the fair trial provisions enshrined in Chapter 2 of the Constitution.[58] Once again witnesses are in a disposition vis-à-vis the offender, because defence counsel will have the opportunity to study the statements made by them for purposes of the cross-examination, whereas no reciprocal duty of disclosure exists in respect of statements made by the offender.

A series of judgments[59] has considered the constitutionality of 'docket- privilege',[60] but **Nortje and Another v Attorney-General and Another**[61] is of particular importance for this discussion because the state in its argument dealt with the most important reasons for upholding the docket privilege of state witnesses. The reasons forwarded by the state

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[56] Privilege can be defined as a right that is vested in a juristic person to prevent the disclosure of admissible evidence. See generally Hoffmann and Zeffertt *op cit* at 236-237; Schmidt *op cit* at 516 and Van Niekerk, Van der Merwe and Van Wyk *Privilegies in die Bewysreg* (1984) at para 1 2. Cf. *S v Lwane* 1966 (2) SA 433 at 438; *S v Heyman* 1966 (4) SA 598 (A) at 610F.

[57] An exception existed where a witness for the state gave evidence, which differed from his statement made to the police in a material respect. In such a case the prosecutor was under an obligation to disclose the discrepancy to the court and to make the statement available to the defence for purposes of cross-examination. See *S v Xaba* 1982 (1) SA 717 (A) at 728E-730D.

[58] In the matter of *Shabalala v Attorney-General of Transvaal and Others* 1995 (2) SACR 761 (CC) the Court held that such a privilege conflicted with s 25(3) of the interim Constitution.

[59] See the following cases in which access to these statements was allowed: *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E); *S v Majavu* 1995 (4) SA 265 (Ck); *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W); *Shabalala v Attorney-General Transvaal* 1995 (1) SA 608 (T). Access was denied in the following cases; *S v James* 1994 (3) SA 881 (E); *S v Fani* 1994 (3) SA 619 (E); *S v Khoza* 1994 (2) SACR 611 (W); *S v Dontas* 1995 (1) SACR 473 (T); *S v Thobejane* 1995 (1) SACR 329 (T). Cf. *S v Smile and Another* 1998 (5) BCLR 519 (SCA) in which the court *a quo* ordered access to the contents of the police docket pursuant to the judgment of *Shabalala and Others v Attorney-General of Transvaal and Another supra* even though access was initially denied.

[60] See PJ Schwikkard 'Access to police dockets - confusion reigns' (1994) 3 *SACJ* 323; W du Plessis 'Toegang tot polisiedossiere' (1994) 3 *SACJ* 307.

[61] 1995 (1) SACR 446 (C). See also in this regard *Khala v Minister of Safety and Security* 1994 (2) SACR 361 (W); *Phato v Attorney-General Eastern Cape and another* 1994 (2) SACR 734 (E).

included: (a) the danger that an accused might manufacture evidence or tailor his case so as to fit that of the state; (b) the fact that he would be in a better position to tamper with witnesses; (c) the fact that inadequacies and inaccuracies that tend to be found in witnesses' statements provide targets for cross-examination, with the result that the truth is obscured rather than revealed; and (d) the fact that witnesses might be reluctant to make statements if they knew that these statements would be handed to the accused. Marais J held:

> The risks presented in (a) and (b) existed but had to be seen in perspective and were in any event risks that were present in all those cases in which preparatory examinations were held in the past. Courts were aware of the problems arising in (c) and could make allowance for them. As to (d) the potential witness would in the majority of cases appreciate that he would eventually have to give evidence in a court and that he would not be deterred from making a statement by the mere fact that his statement would be handed over to the defence. Furthermore, the privilege, which operated as a blanket exclusionary mechanism, could not be saved by the limitation section, section 33 of the Constitution.

The confusion that existed with regard to the accused's right to a fair trial, has been finally settled by the Constitutional Court. The Court held that the privilege was not strong enough to be saved by the limitation clause. Mahomed DP, as he then was, decided in **Shabalala & Others v Attorney-General Transvaal & Another**[62] that the privilege was not consistent with the accused's constitutional right to a fair trial, as embodied in s 25(3) of the Constitution.[63]

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[62] 1996 (1) SA 725 (CC).

[63] See s 25(3) of the interim Constitution that provided as follows:

> Every accused person shall have the right to a fair trial, which shall include the right-
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> (b) to be informed with sufficient particularity of the charge;

It was held further that the accused has the right of access to witnesses' statements but that the state may refuse to disclose these if disclosure is not required in order to afford the accused a fair trial. Several factors may be taken into account in considering a request for the disclosure of the statements, for example, 'the simplicity of the case, either on the law or on the facts or both, the degree of particulars furnished in terms of s 144 of the CPA or in terms of s 87 of the CPA.'[64] The accused may have access to the relevant parts of the police docket even in cases where the particulars furnished might be sufficient to enable the accused to understand the charge against him or her but in the special circumstances of the case it might not enable the defence to prepare its own case sufficiently.[65] The court held that the accused does not have the right to consult with state witnesses if they themselves object, or if the state can prove that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or tampering with his evidence or that it might lead to the disclosure of state secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.

In a review of the judgment it would be appropriate to infer that in certain instances the state would be entitled to oppose a disclosure of the witnesses' statements.[66] Yet, Mahomed DP went further in his judgment, stating that even if the prosecution succeeds in its assertion that there is a reasonable risk that the disclosure of statements at a particular stage might impede the proper ends of justice and the court grants such non-disclosure, it does not follow that the relevant statements or documents will necessarily remain forever protected throughout the course of the trial.[67] He used the example of the intimidated witness who will refuse to testify if his or her identity becomes known to the defence. The judge maintained that such objection does not necessarily apply once the witness has given evidence in chief, because by that time his identity will obviously be known to the defence. He found that:

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[64] *Shabalala supra* at 743E-F.
[65] *Shabalala supra* at 743F-G.
[66] It is conceivable that disclosure might be withheld where a disclosure of the information would prejudice the police's investigation methods or in instances where disclosure might endanger the safety or security of the state.

> There might in such circumstances be no justification for refusing to allow the defence to have access to the statement of the witness for the purpose of enabling *it to test the consistency of that statement with his or her evidence in chief*[68] or any other assertions the witness might make during cross-examination.[69]

It is appreciated that a 'blanket' denial to information in possession of the State might infringe upon the rights of the accused to a fair trial, but in the face of no reciprocal duty on the defence, such disclosure just adds to the vulnerability of state witnesses in the witness box. Once more witnesses have to rely on the court exercising its discretion[70] in their favour if they do not want their statements to be disclosed and that can only happen once there are sufficient grounds not to disclose those statements.

3.2 Penal powers of the court with regard to recalcitrant witnesses

In an analysis of the state's artillery that may be utilised when dealing with witnesses who are unwilling to testify when called upon, it is of paramount importance to distinguish between recalcitrant witnesses and witnesses impeached in terms of s 190 of the CPA.[71] A recalcitrant witness is a witness who becomes unwilling to testify for the

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[67] *Shabalala supra* at 752B-C.

[68] This part of the judgment is emphasised because it so clearly reflects the reason *why* witnesses are at such a disadvantage when testifying in court. In reality the defence is armed with their statements to test their recollection of the events sentence by sentence whilst little attention is paid to the circumstances under which such statements were made to the police.

[69] *Shabalala supra* at 785F-G.

[70] It is submitted that the discretion referred to by Mahomed DP is not a true exercise of discretion against which there are only limited grounds of appeal. Cf. Du Toit et al *op cit* at 23-42O.

[71] Section 190 of the CPA provides as follows:

> (1) Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth day of May, 1961, have been impeached or supported by such party.
> (2) Any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse

state for a variety of reasons, whilst the latter gives testimony that is inconsistent with a previous statement.[72] The procedure applied by the state once it is proved that a witness has made a previous inconsistent statement, would be to discredit the witness. Witnesses would, however, be given the opportunity to advance credible reasons[73] to the court so as to explain the inconsistency in their testimony and the court might still accept their evidence after such explanation.

Recalcitrant witnesses are, however, dealt with in terms of s 189 of the CPA. The provision finds application when witnesses refuse to be sworn or where witnesses having been sworn refuse to co-operate and answer questions put to them. Should witnesses fail to co-operate in any of the aforementioned ways they may be imprisoned in terms of the section.[74] Section 189[75] of the CPA empowers the court to institute a summary[76] enquiry

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to the party calling him), may, after such party or the court has asked the witness whether he did or did not previously make a statement with which his evidence in the said proceedings is consistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he previously made a statement with which such evidence is inconsistent.

[72] Generally a party calling a witness may not cross-examine his own witness but once a witness has been discredited by the party calling him and declared hostile, that party would be entitled to cross-examine him. See *S v Dolo* 1975 (1) SA 641 (Tk); *S v Steyn* 1987 (1) SA 353 (W).

[73] It is envisaged that the following would be considered to be a credible reason, i.e. that the witness wanted to protect the accused or that he was a co-accused but has since been granted immunity and now wants to tell the truth.

[74] Similar provisions are to be found in the Companies Act 61 of 1973 *vide* s 418(5); the Insolvency Act 24 of 1963 *vide* s 66(3); and s 11 of the Constitutional Court Complementary Act 13 of 1995. Cf. *De Lange v Smuts NO and Others* 1997 (11) BCLR 1553 (C) in which the court held that the provisions of s 66(3) of the Insolvency Act 24 of 1963 constitute an impermissible limitation on the right contained in s 12(1)(b) of the Constitution and therefore are unconstitutional.

[75] In *S v Wessels* 1966 (3) SA 737 (C), Van Zyl J considered the development and the rationale behind s 189, previously s 212 of Act 56 of 1955. He held that the provision could be traced back to the Roman Dutch law as well as the English Law. He further surmised that under Roman Dutch law the procedure that existed for a witness to be brought before the court was through the obtainment of a 'mandamus van tuygen'. If the person cited then failed without a just excuse to attend the court or attended the court but refused to testify, he was imprisoned for contempt of court with the object of compelling him to testify. Furthermore, English law recognised the duty to testify and by means of a subpoena and contempt procedures, obtained the same compulsion that was obtained in

into the refusal of such witness to testify. Should the court find that such a person does not have a 'just excuse' for his refusal, it may sentence the witness to a maximum imprisonment of 2 years or where the criminal proceedings relate to an offence referred to in Part III[77] of schedule 2 of the Act, to a maximum of five years imprisonment. Section 189 deals with three types of person, namely:

> (i) a person who refuses to be sworn or to make an affirmation as a witness;
> (ii) a person who has sworn or has made an affirmation as a witness, but refuses to answer a question put to him; or
> (iii) a person who has been sworn or has made an affirmation as a witness but refuses or fails to produce any book, paper or document required to be produced by him.

It should be apparent that there may be many reasons why persons refuse or fail to answer questions in any of the aspects set out above. The law, however, only pardons those who have a 'just excuse'. It is not a witness's prerogative to determine whether he has sufficient justification for refusing to testify or for failing to submit the necessary documents.[78] For instance: as regards category (i) an obvious reason why a person may

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the Roman Dutch law by the use of the 'mandament van tuygen' and contempt proceedings where the proposed witness failed to obey the mandament. See *Wessels supra* at 739B-E.

[76] A summary enquiry occurs where witness is not formally charged but the proceedings still remain judicial proceedings, even though it does not constitute a criminal trial.

[77] Offences mentioned in part III are sedition, public violence, arson, murder, kidnapping, childstealing, robbery, housebreaking, contravention of the provisions of section 1 and 1A of the Intimidation Act 72 of 1982; or any conspiracy, incitement or attempt to commit any of the aforementioned offences.

[78] Cf. *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) O'Regan J at 514A-C:

> All modern societies require the assistance of members of the community in facilitating the administration of justice. Inevitably the obligations thus placed on witnesses can be inconvenient and at times unpleasant. In certain circumstances giving evidence to a court or commission may even put the witness at risk of some disadvantage such as civil liability. The overwhelming interest of society is however that citizens nevertheless co-operate to ensure that the administration of

refuse to testify, recognised since early days, is his state of health. Thus a person who is required to be a witness may show that it would be severely detrimental to his health to testify. This would amount to a 'just excuse'. In addition the book, paper or document which the witness is required to produce under category (iii) may be of very slight relevance, and the cost or trouble involved in obtaining it and bringing it to court extensive. Can it be supposed that the legislature would have intended that such circumstances, however extreme, could never amount to a just cause? I do not think so. It is possible to imagine many circumstances in which the failure of a person to comply with his testimonial duties would be generally regarded as blameless, and his punishment for such failure as unjust. A 'just excuse'[79] in terms of s 189 should therefore not be confined to matters of privilege, compellability and admissibility alone. In **S v Heyman**[80] the purpose of the section was fully explained by Steyn CJ:

> In deciding whether or not to be sworn or to affirm, he would have to consider whether or not to he would have a just excuse for refusal. Although technically, if he should refuse, he would not be an accused, his refusal without a just excuse would there and then expose him to punishment. In the decision he has to take, he is face to face with consequences ordinarily attached to serious offences, namely a sentence of imprisonment of up to twelve months, without the option of a fine. To avoid this penalty, he must either take the oath or affirm and give evidence, or else he must tender a just excuse. The latter is not a self-explanatory concept, not even to a lawyer and certainly not to a layman. If he refuses he is called upon to present the equivalent of a defence to a charge in a criminal case. It goes without saying that he is entitled to be heard, and, if he is entitled to be heard in person, I know of no ground upon which he could be denied the right to assistance by his counsel or

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justice is not prevented.

[79] As to what will constitute a 'just excuse', see Hoffmann and Zeffertt *The South African Law of Evidence* 4 ed (1988) at 369-370; Schmidt *Bewysreg* 2 ed (1989) at 221-223; Du Toit et al *op cit* at 23-15 to 23-16A.

[80] 1966 (4) SA 598 (A).

> attorney accorded to every person entitled to be heard in judicial proceedings which may result in a judgment imposing a punishment.[81]

The following requirements would have to be met before witnesses may be sentenced to imprisonment in terms of this section:[82] the witness must have refused to take the oath or to testify, the presiding officer must have held an enquiry into the refusal; and there must have been no 'just excuse'[83] for the witness's failure to do so.

A presiding officer is afforded a discretion to determine whether an excuse advanced by a witness for his or her refusal is just or not. What is quite significant about this section is that 'just excuse' does not include fear of being branded as a traitor[84] by friends nor refusal to testify because of strict religious or political convictions. It is submitted that although the aforementioned reasons may be regarded by the general public as 'lawful excuses', it should not to be considered as 'just' in terms of this provision. In determining the meaning of the term 'just excuse', it is accepted that courts interpret the term to mean more than just an 'lawful excuse'.[85]

Because human affairs are so unpredictable in their diversity, it will be required of a court, when asked to apply s 189, to decide each case on its own merits, having regard to the general principles underlying this section. Section 189 of the CPA is applied both to enquiries and to trials. In ascertaining its meaning, regard must be had accordingly to its role in both sets of circumstances. If there is a greater chance of acceptable excuses existing for a refusal to testify before an enquiry, it would widen the ambit of circumstances in which an injustice would be done. If a restricted meaning is accorded to a 'just excuse' at a trial rather than at an enquiry, an increased likelihood exists that the legislature would not have intended such a meaning.

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[81] *S v Heyman supra* at 604A.
[82] *S v Seals* 1990 (1) SACR 38 (C).
[83] The concept 'just excuse' is not defined in the CPA.
[84] See *S v Govender and Others* 1967 (2) SA 121 (N).
[85] *Attorney-General Transvaal v Kader* 1991 (2) SACR 669 (A).

For the reasons set out I contend that the expression 'just excuse' in s 189 has a wider connotation than merely embracing excuses arising from the rules of evidence. It is, however, not possible to define the term 'just excuse'. Courts should therefore not use the 'humanly intolerable' formulation as a general test only, even though it is useful as a factor in determining whether a recalcitrant witness had a 'just excuse' not to testify. The enquiry should be a factual enquiry based on the special reasons forwarded by the particular witness.

Prime examples of the unsatisfactory position witnesses have to face are reflected by reviewing the case law. One case in particular, namely the case of **S v Nkosi**[86] reveals the vulnerability of a witness confronted with the penal powers of the court by virtue of s 189 of the CPA. In **Nkosi** the witness was illiterate and unlikely to be aware of a right to legal representation or to request an adjournment to obtain such and the magistrate failed to advise the witness of such a right. The witness was called as a witness for the prosecution, and at a point during the trial, declined to answer a proper question put to him by the prosecutor, and thereafter remained silent. Consequently the magistrate conducted an investigation in terms of s 189 of the CPA whereupon the witness remained silent throughout the enquiry proceedings.

For his pains, the witness earned himself a two-year prison sentence. On appeal, the issue was whether the Court was under a duty to inform a recalcitrant witness such as the appellant of his right to be legally represented before going on to try him for a contravention of s 189 of the CPA and whether such intimation vitiated the proceedings. On appeal it was held that there was no reason in logic or fairness for depriving a witness facing an enquiry under s 189 of the CPA of the right to legal representation afforded to an accused in terms of s 73 of the CPA and that the witness under the circumstances should have been informed of this right.

The arguments put forward by the state in **Nkosi** warrant closer scrutiny, particularly in light of recent case law. The state argued that the court was justified in not informing the

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[86] 1990 (1) SACR 509 (N).

witness of his right to legal representation by pointing to the differences between a person charged in the ordinary way and a witness whose conduct is summarily investigated. According to counsel for the state an ordinary accused is brought to court by arrest or warning and a witness was not. An accused is entitled to a properly formulated charge; a witness not. An accused is confronted by evidence; a witness not. An accused's guilt must be established beyond reasonable doubt; a witness is deemed to have made himself liable to imprisonment unless he can advance a 'just excuse' for his refusal. An accused is opposed by a prosecutor and tried by the court, whilst a witness has to face inquiry by the court only. An accused cannot be punished more than once for his offence; a recalcitrant witness if he persists in his refusal can be sentenced again and yet again in terms of s 189(2) of the CPA. A convicted accused sentenced to imprisonment serves out his sentence, subject only to interference on appeal or review; a witness in terms of s 189(3) of the CPA can earn remission of his sentence from the very court sentencing him. All of this then goes, according to the state, to show that the witness does not fall into the same category as an accused person.

It was submitted that a recalcitrant witness is *sui generis* and as such is not entitled to avail himself of the rights conferred by s 73 of the CPA. The nub of the state's argument is to be found in the words of the section. It provides:

> 73 Accused entitled to assistance after arrest and at criminal proceedings.
> (1) An accused who is arrested, whether with or without warrant,
> shall, subject to any law relating to the management of prisons, *be entitled to the assistance of his legal adviser* from the time of his arrest.
> (2) An accused *shall be entitled to be represented by his legal adviser* at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.[87]

Counsel acting on behalf of the state argued that the witness is demonstrably not an accused in terms of s 73 of the CPA. Should any doubt still exist regarding the status of

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[87] Emphasis added.

the witness, it was argued that the phrase 'criminal proceedings' contemplates a trial in only the conventional sense and not a summary procedure under s 189 of the CPA.[88] What makes this argument so attractive is that the Constitutional Court in the matter of **Nel v Le Roux and Others**[89] made the same distinction between accused persons and examinees in terms of s 205 of the CPA but for different reasons.[90]

Turning back to **Nkosi**, counsel acting on behalf of the accused made the cogent point that, on the State's argument, a witness facing an enquiry under s 189 of the CPA would be gravely disadvantaged compared with an ordinary accused. The ordinary incidence of criminal *onus* is subverted and the burden is on the witness to offer a 'just excuse' for his conduct. After consideration of counsel's arguments, as set out above, the court held that the need to advise a witness of his rights is greater in matters like the one before the court where no reason whatever can be seen for the witness's actions. A failure to inform a witness of his right to legal representation would render the right nugatory.[91] Fortunately Alexander J held that there is no reason in logic or fairness for depriving a witness facing an enquiry under s 189 of a right that may be claimed by an accused, namely the right to legal representation.

The matter of **Nkosi** illustrates how the courts may fail witnesses. In the case the court was confronted with a witness with an inexplicable attitude and a situation that seemingly cried out for something to be done on the witness's behalf. Yet the court proceeded to exercise its penal power without even informing the witness of a right to legal representation and sentenced the witness to two years imprisonment. It is trite that in any community, whatever its composition, the proper administration of justice requires that the dignity and authority of the courts be upheld. To permit witnesses to refuse to answer

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[88] See *R v Hlengwa* 1958 (4) SA 160 (N) at 164; *S v Heyman and Another* 1966 (4) SA 598 (A) at 601G; *S v Sexwale and Others (1)* 1978 (2) SA 363 (A) at 365D-H; *S v Swanepoel* 1979 (1) SA 478 (A) at 489H *et seq*.

[89] 1996 (1) SACR 572 (CC).

[90] For a discussion of this case see *infra*.

[91] See *S v Radebe* 1988 (1) SA 191 (T); *S v Rudman and Others* 1989 (3) SA 368 (E); *S v Mthwana* 1989 (4) SA 361 (N) and for a more recent approach see *S v Lombard* 1994 (3) SA 776 (T).

questions without good reason is to make a mockery of justice but to incarcerate them to a maximum of two years of imprisonment is not an inducement to testify.

The following propositions made by Wigmore[92] in support of courts punitive powers when dealing with recalcitrant witnesses are to be considered. First, it is extremely important from society's point of view that potential witnesses should give relevant evidence on matters within their knowledge.[93] Secondly, all privileges arising from the duty to testify are exceptional, and must be discountenanced. Thirdly, a duty rests on each member of society to make his knowledge available to courts of law even if this means a sacrifice of his privacy or would have other disagreeable consequences for him.[94]

In consideration of the liability under this section of witnesses to co-operate and testify, it is argued that courts should not overemphasise the interests of the community in holding the witnesses liable for not testifying. It goes almost without saying that the public interest in the availability of evidence must be weighed up against the inconveniences which the witness is likely to suffer if he has to testify. It is questionable whether the public interest should be accorded more weight than that of the individual in striking a balance.[95]

Any court holding any enquiry should bear in mind the words of Chief Justice Steyn in **S v Weinberg**,[96] namely that the excuse tendered would have to be of sufficient cogency, taking all the circumstances into consideration, for the witness to be absolved from the duty not to withhold the truth from the court.[97] It follows that, if this was not so, the

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[92] See J H Wigmore *Treatise on the Anglo-American System of Evidence in Trials at Common Law* 3 ed Vol 8 (1940) para 2285 at 527.
[93] *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A) at 615G-H.
[94] *S v Maduna* 1978 (2) SA 777 (D) at 783E-H and *S v Leepile and Others(6)* 1990 (3) SA 988 (W) at 995D-G.
[95] See *R v Packer* 1966 (2) SA 56 (RA).
[96] 1966 (4) SA 660 (A) at 666A.
[97] The *dictum* of Steyn CJ was endorsed by Grosskopf JA in *Kader supra* at 737D-F:

> For the reasons set out above I consider that the expression 'just excuse' in s 189 has a wider connotation than merely embracing excuses arising from the rules of

underlying statutory intention of the aforesaid s 189 of the CPA would simply be defeated. Moreover, a court should not lose sight of the principle stated by Wigmore and quoted with approval in **Schermbrucker v Klindt No**[98] that:

> The vital process of justice must continue unceasingly: a single cessation typifies the prostration of society: a series would involve its dissolution.[99]

In the present context, it seems wrong to describe the duty to testify as 'paramount' in each and every case because this would suggest that it would always, and in all circumstances, prevail over any excuse which an unwilling witness might offer. That would, of course, not be correct. This section would not be seen as so unjust by witnesses if they could as of right demand witness protection from the state. Such protection would be a more balanced approach, than to expect of witnesses to testify under circumstances where they really fear for their lives. The words of Eloff DJP eloquently summarise the basis for such an approach:

> On the facts of the present case I do not think that appellant No 1 had a just reason not to testify. Even if he had reason to fear for his safety and for that of his family, the demands of society and the interests of the administration of justice require that he should nevertheless give evidence. I share the feeling of sympathy of the regional magistrate with appellant No 1 who may, after giving evidence, have to rely on possible inadequate police protection, or, as he said, have to leave the Witbank area. But more is at stake than the allayment of the fears of appellant No 1.[100]

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privilege admissibility and compellability. And for the purposes of the present case it seems to me that we should follow as the Court *a quo* did the suggestion by Steyn CJ in *Weinberg*'s case *supra* and hold that it would amount to a 'just excuse' if a witness were to find himself in circumstances in which it would be humanly intolerable to have to testify. This seems to me the type of circumstance which the Legislature must have had in mind in speaking of a 'just excuse'.

[98] 1965 (4) SA 606 (A).

[99] *Schermbrucker v Klindt supra* at 615H.

The Constitutional Court has had cause recently to consider the meaning of the term 'just excuse'.[101] The Court was called upon to decide the constitutionality of s 205[102] of the CPA. It held that the answer to any question put to an examinee at an examination in terms of s 205 of the CPA, would infringe upon the examinee's fundamental rights, only if such infringement would constitute a 'just excuse' for the purposes of s 189 of the CPA, unless the compulsion to answer the question would, in the circumstances, constitute a limitation on such right which is justified in terms of the limitations clause. It is submitted that, in view of the decision of the court in **Nel,** courts should in future consider the meaning of 'just excuse' by having regard to the provisions of s 39(2) of the Constitution, i.e. by considering 'the spirit, purport, and objects of the Bill of Rights', in interpreting 'just excuse'. Greater certainty could, however, be brought about for witnesses if the concept were to be defined in terms of the CPA.[103]

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[100] *S v Moloto and Others* 1991 (1) SACR 617 (T) at 621.
[101] In *Nel v Le Roux supra.*
[102] This section is very relevant to any discussion of s 189 of the CPA, in that s 205(3) of the CPA provides for the same summary incarceration procedure, as s 189 of the CPA. See discussion 2.2 *supra.*
[103] See recommendation chap 8 *infra.*

Chapter 4

4. Bail

4.1 Bail - and its implication for victims and witnesses of crime

Since the adoption of a new constitutional order in 1994 a perception has arisen amongst the public that bail is granted too easily, and that those accused that are released on bail commit serious offences once they are released from custody.[1] Bail has become a controversial issue for a number of reasons. One of these is that victims and witnesses are not sufficiently protected in the system, and that unless accused persons are incarcerated before the trial these witnesses will remain vulnerable to intimidation and pressures from the accused. Bail becomes even more complex if one bears in mind that one is dealing with two competing and opposing interests. On the one hand there is the interest of the accused to be presumed innocent until proven guilty, and on the other hand there are the rights of witnesses and society at large to be protected against hardened criminals and to see that each case reaches its conclusion without any undue delay.

Wide-ranging criticisms were levelled at bail practices by the public soon after the interim Constitution came into operation. One of the most repeated criticisms was that the Constitution was to be blamed for the fact that bail was being granted too readily by the courts. It was claimed that the granting of bail could indirectly be blamed for the crime wave that had struck the country. This perception of 'easy bail' was also shared by practitioners, like the Western Cape Attorney-General, Adv Frank Khan, who said with reference to bail:

> We are subject to a system weighing heavily in favour of the liberty of the individual. The Constitution, in the process of protecting individual

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[1] See South African Law Commission Report entitled *Bail Reform in South Africa* Project 66 (1994) para 1.8.

liberties, might depending on court interpretation favour criminals to the detriment of the very society it seeks to serve.[2]

In an address that dealt with certain problems relating to bail that existed after the interim Constitution had come into operation, the former Attorney-General of the Witwatersrand, Adv Klaus von Lieries und Wilkau, said that the following problems were being experienced by his office with regard to bail cases. First, that prosecutors had insufficient time to investigate relevant facts pertaining to the accused. This fact was exacerbated by the situation that an accused could also virtually demand an instantaneous bail hearing.[3] The second problem was that prosecutors needed orientation and training[4] concerning bail matters. Thirdly, he maintained that presiding officers needed to be better informed as to what was expected of them.

One of the criticisms levelled at the Constitution was that the degree of protection afforded to accused persons was responsible for the disarray in the justice system, especially since it resulted in bail being granted too easily. The legislature responded rapidly to this criticism by enacting new bail legislation in the form of the Criminal Procedure Amendment Act,[5] which came into operation on 21 September 1995. The 1995 Act not only improved the position for victims of crime, but also changed the bail law quite extensively. The Act came at a time when it was very much needed to balance the rights of victims and witnesses with those of the accused. These amendments came into

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[2] See 'Easy Bail' *The Citizen* 6 September 1994 at 6.

[3] The following matters need to be investigated and are cited by him: the question of the true identity of the accused, the question of the criminal bureau checking outstanding warrants, the question of investigating any possible previous jail breaks by the accused, bail breaches and so forth, a nationality check - question whether the accused is South African citizen and/or whether he could obtain asylum in a foreign country, the mobility of the accused, his access to overseas travel, his list of previous convictions, his personality type and his personal circumstances. The investigation of these matters requires time. See paper delivered at the National Consultative Legal Forum, Cape Town, 11 -13 November 1994, by Adv K von Lieries und Wilkau.

[4] As for the perception that prosecutors lack training see a more recent view by H Combrinck 'Access to justice and the prosecutorial authority' (1996) 21 *Journal for Juridical Science* 128.

[5] Act 75 of 1995.

operation after a thorough investigation by the South African Law Commission, which in its discussion of the problems concerning bail,[6] stated *inter alia* that any invasion of the freedom of the individual had to be weighed up against the sound administration of justice and the interests of the community. The Law Commission in its report emphasised that the collection of information should form an important part of a bail application, and that bail proceedings should therefore be conducted in an inquisitorial manner. These concerns as stated and identified by the Law Commission relate to the core issue which will be discussed in this chapter, viz whether the system can sufficiently protect witnesses without compromising the accused's right to liberty.

The controversy regarding bail did not stop after 1995, despite the fact that adequate legislation was in place to protect the rights of witnesses. The public remained convinced that the right to bail was to be blamed for the increase in crime, and this belief was strengthened by one case in particular, concerning a victim called Mamokgethi Malebane.[7] This case sparked an outcry from the community that courts failed to protect innocent victims, by granting bail to hardened criminals without recognising the rights of victims.[8] Questions were asked why suspects, like the murderer of Mamogethi Malebane, and others, were being granted bail by the courts. Suggestions were made that the bail law should be tightened to make it more difficult for accused persons to be released on bail. Government's response to these calls for vengeance, however, was to amend the bail law. This change to the law was effected by the enactment of the 1997 Criminal Procedure Second Amendment Act.[9] This legislation will be examined together with other reforms to determine whether the legislation was reasonable and in the interest of victims and witnesses.

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[6] See *op cit* chap 2.

[7] The victim in this case, Mamogethi Malebane, was killed by the accused, Dan Mabote, shortly before she had to testify against him. The accused was released by the court on bail of R2000 despite the fact that the police were investigating two other matters of rape against him and that the police had opposed the bail application in the matter.

[8] See 'Justice betrayal of innocence' *The Weekly Mail and Guardian* 9 May 1997 at 9; 'Selmaats slaan man na moord op kind' *Die Burger* 2 August 1997 at 4.

[9] Act 85 of 1997.

Whether there has ever been a legitimate reason for the public to lose faith in the bail system can only be assessed once the law relating to bail has been examined.[10] However, it must be acknowledged that the South African public and victims of crime without a doubt had sufficient reason to be disappointed in the justice system as a whole.[11]

I shall now consider the concept of bail, the statutory provisions governing bail and finally the case law pertaining to bail. In an analysis of the statutory provisions I shall examine all reforms to the bail legislation over the past ten years to determine whether the legislation sufficiently protected the rights of witnesses and victims and whether these reforms impacted positively or negatively on the system as a whole. The final aspect to be discussed will be other more innovative ways and means of addressing the

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[10] It is submitted that the real reason for bail being granted too readily was not inadequate bail legislation but rather inadequate application of the law by prosecutors and magistrates. See Memorandum on the objects of the Criminal Procedure Second Amendment Bill 84 of 1997. Specifically para 2, which reads as follows:

> Although the present bail system works reasonably well and a balance is struck between the interests of the offenders and those of the victims and society as a whole, there is still vehement criticism against the bail system. There is a perception, as well as indications, that persons who have committed serious offences are released on bail too easily, or that persons who are released on bail commit serious offences whilst on bail. There are also allegations that *police officials, prosecutors and magistrates are not properly trained* or that they *do not show the necessary understanding* during the consideration of bail applications. (Emphasis added).

[11] IDASA, in a survey amongst people of the Cape Flats, confirmed that South Africa's criminal justice system carries a predominantly negative image amongst the people of the Cape Flats. Those that had actually been victims of crime had much more negative evaluations of the courts and the police because of their direct experiences. The following perceptions are important for purposes of this critique. First, regarding the courts: 43% of the people thought that the courts are giving appropriate sentences, whilst 32% of the people thought that the courts are giving the right decisions. More disturbing than the perceptions just mentioned is the perception of the very same people, on the treatment they received from the courts in particular: 23% were of the view that the courts treated them fairly and 59% were of the opinion that no fair decisions are made by the courts. Furthermore, 68% of the people participating felt that they would not be safe even whilst testifying in court. Finally, only 27% of the people participating in the survey approved of the courts' performance. See IDASA's Report on *Community Responses to Crime on the Cape Flats* No 8 dated 12 September 1996.

inadequacies of the bail system and the advantages that these innovations and recommendations may hold for witnesses and victims of crime.

4.2 Historical overview

Bail can be defined in our law as the practice of releasing an accused before a trial on the accused's promise to return.[12] Such promise is then secured by some form of collateral, such as money, that the accused pays to the court and which the court can retain if he does not appear for trial. Van der Berg[13] explains that bail developed out of English law which provided that an accused had to pay an amount of money to the complainant as temporary damages to prevent family feuds and self-help. The money was then given back to the accused if he was acquitted. It was only later that the emphasis shifted to bail, in that the accused had to pay money for his freedom with an undertaking that he would attend the trial at the appointed time. Other scholars, like Terblanche,[14] argue that bail is *sui generis* and not analogous to any other concept in our law.

One can therefore say that the rationale underlying the right to bail derived from the principle that every person has a right to personal freedom and liberty. Such personal freedom is acknowledged in all Western democracies.[15] Our bail process is also

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[12] See *R v Wilson alias Gannon* 1914 TPD 5 at 6.
[13] J van der Berg *Bail - A Practitioner's Guide* (1986) at 2.
[14] See S Terblanche 'Borgtog 'n labirintiese doolhof' (1988) 2 *SACJ* 280 at 287.
[15] The right to bail is recognised in article 9(3) of the International Covenant on Civil and Political Rights, Article 11 of the United Nations Universal Declaration of Human Rights and Article 6(2) of the European Convention of Human Rights and Fundamental Freedoms. Article 14 of the International Covenant on Civil and Political Rights is the perhaps the most important international provision as it is widely seen as a statement of the international law rules governing a fair trial. For this reason its provisions have been adopted by the international tribunals established to try persons for human rights violations in the former Yugoslavia and Rwanda and by the International Law Commission in its proposals for a permanent International Criminal Court. Article 14 provides: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.' The right to bail before trial is rooted ultimately in chapter 39 of the *Magna Carta*, which states: 'No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed

consistent with the presumption of innocence. This is a substantive principle of fundamental justice which protects the fundamental rights of liberty and human dignity of any person accused by the state of committing a crime.[16] It should be borne in mind, even at the bail application that it is the duty of the prosecution to prove beyond a reasonable doubt that the accused is guilty of the offence with which he or she is charged and that, until the prosecution so proves, [17] the accused must be presumed to be innocent.[18] This presumption of innocence[19] is a fundamental principle recognised in most criminal justice systems.[20] This then explains why courts will generally grant bail whenever possible and why courts will even lean in favour of the liberty of the accused,[21] provided that it is in the interests of justice to do so.[22]

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against or prosecute him, except by the lawful judgment of his peers and by the law of the land.' See A E Dick Howard *Magna Carta: Text and Commentary* (1964) at 43.

[16] See *S v Fourie* 1973 (1) SA 100 (D).

[17] See *Woolmington v DPP* [1935] AC 462 at 481-482.

[18] See s 35(3)(h) of the Constitution. This section provides as follows:

> (3) Every accused person has a right to a fair trial, which includes the right -
>
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

[19] It is important to note that this presumption has been recognised since 1789. Article 9 of the French Declaration *des droits de l'homme et du citoyen* for example began with the words: 'Every man being counted innocent until he has been pronounced guilty, if it is thought indispensable to arrest him, all severity that may not be necessary to secure his person ought to be strictly suppressed by law.' Scholars, like H J Berman, maintain that this French doctrine was originally intended to operate, primarily, at the stage of investigation. See H J Berman 'The Presumption of Innocence: Another Reply' (1980) 28 *American Journal of Comp Law* 615 at 622. See *Krause v Switzerland* (7986/77) DR 13 at 73. In this matter the European Commission of Human Rights stated almost in a similar vein that the principle of the presumption of innocence is in the first instance a procedural guarantee applying in any kind of criminal procedure, its application reaches therefore much further than just the trial.

[20] It is my contention that the right to be presumed innocent should be broadly interpreted so as to relate to all the stages of the trial process. Others, like Steytler, consider the right to be presumed innocent as a 'trial' right. Steytler relies in support of his argument on Canadian jurisprudence, more specifically the *dictum* of the Canadian Supreme Court in *R v Pearson* (1992) 77 CCC (3d) 124. The court in *Pearson* found that the right to be presumed innocent and the right to be released on bail find application at different stages of the proceedings and in different forms. See N Steytler *Constitutional Criminal Procedure* (1997) at 134.

[21] See *Stack v Boyle* 342 US 1 (1951). Vinson CJ stated with reference to the right of bail 'this traditional right to freedom before conviction permits the unhampered preparation of a defence, and serves to prevent the infliction of punishment prior to conviction. Unless

It was, however, inevitable that the South African criminal process would transform as a result of the introduction of our Bill of Rights.[23] Bail was no exception to this rule.[24]

4.3 Current statutory provisions governing bail

Bail is presently defined in s 58[25] of the CPA and regulated by ss 58 to 71 of the CPA. It should however be borne in mind that bail is also regulated by s 35 of the Constitution.[26]

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this right to bail before the trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.'(At 6) See *S v Acheson* 1991 (2) SA 805 (Nm).

[22] *S v Smith* 1969 (4) SA 175 (N) at 177E-F.

[23] The fundamental rights of the individual are enunciated in Chapter 3 of the interim Constitution and Chapter 2 of the Constitution.

[24] See s 25(2)(d) of the interim Constitution and s 35(1)(f) of the Constitution.

[25] Section 58 of the CPA provides as follows:

> The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentenced is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account-
> (a) the fact that the accused has been convicted of that offence; and
> (b) the likely sentence which the court might impose.

[26] Section 35 of the Constitution provides for the rights of arrested, detained, and accused persons:

> (1) Everyone who is arrested for allegedly committing an offence has the right-
> (d) to be brought before a court as soon as reasonable possible, but not later than 48 hours after the arrest, but if that period expires outside ordinary court hours, to be brought before a court on the first court day after the end of that period;
> (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
> (3) Every accused has a right to a fair trial, which includes the right -
> (h) to be presumed innocent

It should also be observed that the law regarding bail is not exclusively regulated by legislation but also by judicial decisions relating to bail. The most important provision is considered to be section 60 of the CPA.[27]

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[27] Section 60(1) – (4) of the CPA provides as follows:

(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6) and (7), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.

(b) Subject to the provisions of section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

(c) If the question of the possible release of the accused on bail is raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court-

(a) may postpone any such proceedings as contemplated in section 50(3);

(b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11)(a) and (b), require of the prosecutor to place on record the reasons for not opposing the bail application.

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or the public interest, or will commit a Schedule 1 offence; or

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

4.4 Impact of the Constitution and the 1995[28] and 1997[29] amendments

It is important to look at the decisions of our courts to determine the impact of the Constitution and the new bail laws introduced over the past five years. When the interim Constitution came into operation in 1994 it spelled out a detained person's rights. It is these rights, and the interpretation of these rights adopted by the courts, that caused confusion amongst members of the judiciary regarding certain issues, such as who bears the *onus* in a bail application and how much weight should be attached to the 'interests of justice'.

4.5 *Onus*

In the past a bail application was regarded as a *sui generis* application and the *onus* was on the accused to show on a balance of probabilities that he should be released.[30] After the commencement of the interim Constitution a host of decisions followed, all considering the *onus* of the parties in a bail application. **In Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling**[31] the court attempted to move away from the question of *onus*. Van Schalkwyk J decided that there can be no question of an *onus* of proof in a bail application but that the state has to commence with the leading of evidence. The judge stated that if at the end of the enquiry there was still a balance between the interests of the accused and those of justice, then the accused had to be released on bail. What is even more significant about this judgment is the emphasis found therein that judicial officers should change their role from being passive onlookers to more active inquisitorial adjudicators.

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[28] Section 60, as amended by s 3 of the Criminal Procedure Second Amendment Act 75 of 1995.

[29] Criminal Procedure Second Amendment Act 85 of 1997.

[30] See *S v Hlongwa* 1979 (4) SA 112 (D).

[31] 1994 (2) SACR 579 (W).

In **Magano and Another v District Magistrate, Johannesburg and Others (1)**[32] the approach was adopted that the *onus* rests on the state to prove why the accused should not be released from custody. In determining the implications of the Constitution and the 1995 amendments on bail, it is perhaps wise to look at the judgment of Levenson J in **S v Mbele and Another**.[33] The judge maintained that there is really nothing new in s 60(4) of the CPA and that the question of granting bail still remains within the four broad categories of risks relating to uncertain future events.[34]

Levenson J held, further, that there was a tendency to avoid the use of the expression 'burden of proof'. Bail applications were not criminal proceedings and the court was not required to weigh proved facts but to speculate on future conduct on the basis of information laid before it. It was clear from the cases though that '*onus*' was a well-known concept in bail proceedings and there was no purpose in being coy about the use of the word. Courts should therefore not shrink from using it, simply because of the nature of the proceedings.[35] Leveson J held that the legislation, after the 1995 amendments, squarely placed the *onus* where it has always belonged - on the accused.[36] He then, finally, considered the impact of the interim Constitution and more specifically

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[32] 1994 (2) SACR 304 (W).

[33] 1996 (1) SACR 212 (W).

[34] At 223d-f he remarked as follows:

> There is nothing new in that subsection. For example, before its enactment the learned authors of Du Toit, De Jager and Others, in their *Commentary on the Criminal Procedure Act* at 9-8B to 9-10C, had summarised the principles governing the decision to grant or refuse bail as being concerned with four broad categories of risks relating to uncertain future events. These were:
> (1) the risk of whether the accused would stand his trial, which is now dealt with by s 60(4)(b);
> (2) the risk of whether the accused would interfere with State witnesses or the police investigation, which is now dealt with by s 60(4)(c) and (d);
> (3) the risk that the accused might commit other crimes, which is now dealt with by s 60(4)(a) and (d);
> (4) the risk that the release of the accused might endanger law and order or public safety or national safety, which is now dealt with by s 60(4)(a).

[35] *Mbele supra* at 220h-j.

[36] Cf. *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden en Andere* 1994 (2) SACR 469 (W) where the court held that the state should not be saddled with an *onus* to prove that an arrested person should not be released.

s 25(2)(d) of the Constitution:

> I now turn to consider the new legislation. The starting point, in my opinion, is that for reasons already given, the essence of s 25(2)(d) is that it merely recites the right of the individual to his liberty and does not prescribe any procedural provisions for the determination of that right. Thus there is nothing in the section which prohibits the enactment of legislation, the purpose of which is to cast the burden on one party or the other. The section is neutral. It neither empowers nor prohibits.[37]

In contrast to **Mbele** *supra* is the decision of Edeling J in **Prokureur-Generaal, Vrystaat v Ramokhosi**[38] holding that there is a burden of proof on the state to submit information showing that it is in the interests of justice that bail be refused. It is submitted with regard to the question of *onus* in bail applications, that courts should interpret the statutory provisions regarding bail having due regard to 'the spirit, purport and objects of the Bill of Rights of the Constitution'.[39] In doing so, logic dictates that the state in each bail application will bear the *onus* of proving that a detention is 'in the interests of justice'. The court in **S v Vermaas**[40] held, with reference to the interpretation of s 60 as amended by the 1995 Act, that the amendment of the CPA had been passed amidst a full-blown debate about bail, bail conditions and the *onus* in bail cases. In view of this, one had to accept that the wording of s 60 as a whole, and s 60(11) as amended by the 1995 Act in particular, had been well chosen. The Court held that it is clear from the wording of s 60 of the CPA that the general rule set out in s 60(1)(a) is that the accused was entitled to be released on bail unless a court finds that it is not in the interests of justice that he be detained in custody. That wording created an *onus*. The *onus* rested upon the party who asserted that the accused should not be released, i.e. the state. The converse

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[37] *Mbele supra* at 218a-b.

[38] 1997 (1) SACR 127 (O).

[39] See s 39(2) of the Constitution that provides as follows:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and the objects of the Bill of Rights.

[40] 1996 (1) SACR 528 (T).

was the case where s 60(11), as amended by the 1995 Act, applied. It was expressly worded as an exception by the use of the phrase 'notwithstanding any provision of this Act'. It was also limited to only the crimes stated in Schedule 5 and if an accused person again committed a crime set out in Schedule 1, while out on bail. It was imperative: 'the court shall order the accused to be detained'. The accused was called upon to satisfy the court that the 'interests of justice' did not require his detention in custody. Clearer wording could not be sought for imposing an *onus* on the accused.

Section 60(11) as introduced by the 1995 Act, placed a reverse *onus* on the accused. In such cases it is for the accused to satisfy the court that the 'interests of justice' do not require his or her continued detention. In view of the fact that the provision did not affect all accused people but only those again committing a Schedule 1 offence or committing a serious Schedule 5 offence, it is submitted that the provision was defensible as a permissible limitation[41] of the accused's right to be presumed innocent.[42] In my view the 1995 bail legislation was sound and good law. The law offered sufficient protection to all, including victims and witnesses, provided that the courts fulfilled their functions by applying the law as required. Moreover the 1995 amendments were also constitutionally sound.

It has been stated in this chapter that the intentions of the legislature in introducing new bail provisions by virtue of the Second Criminal Procedure Amendment Act of 1997 may have been noble. It wished to show victims of crime and the public that they would be afforded better protection through further legislation and that crime would be combatted successfully by its application. In an attempt, however, to make it more difficult for an accused to apply for bail, government, in my view, overstepped the boundaries of

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[41] In terms of section 36 of the Constitution.

[42] Such interpretation is supported by the judgment of the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 at 388 E para 28 where the Court stated:

> Article 6(2) of the European Convention of Human Rights and Fundamental Freedoms does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits, which take into account the importance of what is at stake and

constitutional criminal justice. It is doubtful whether the law will succeed in its objective. Frustrating from the perspective of witnesses is the fact that many hopes and expectations have been raised by this legislation whereas all factors point to it being unconstitutional. Those sections that are most at risk are subsections 60(11), 60(11A) and 60(11B) of the CPA as amended, which in essence require that an accused adduce evidence that 'exceptional circumstances'[43] exist which in the 'interests of justice' permit his release, or require that an accused adduce evidence which will satisfy the court that the 'interests of justice' permit his release.[44] Because the term 'exceptional circumstances' is not defined in any way, it could be interpreted as covering a broad range of circumstances. This term has already created interpretation problems for the courts. It is submitted that unless the legislature intervenes these problems will just multiply in future. For instance, in the matter of **Jonas v S**[45] the court held that the incarceration of an accused for an offence he claimed he did not commit, and which were not contradicted by the state by way of any evidence – should be considered as 'exceptional'. It is doubtful whether the legislature ever intended that such a circumstance be labelled as exceptional under this Act. It is my contention that the circumstance proffered by the accused in the case of **Jonas** is rather the norm than the exception in criminal trials. I can therefore not agree with the finding by Horn J as to what constitutes an exceptional circumstance. I do,

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maintain the rights of the defence.

[43] See s 60(11)(a) of the CPA that provides as follows:

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

[44] See s 60(11)(b) of the CPA that provides:

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(b) In Schedule 5, but not Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

[45] (1999) 1 All SA 578 (SE).

however, support the judgment on the basis that it demonstrates concern for the rights of the greater society.[46]

The 1997 Act also brought with it changes to the scheduling of offences in the CPA. The most important offences are those listed in Schedules 6 and 5.[47] Schedule 6 of the CPA lists four very serious offences, by qualifying each of these offences with reference to either a particular victim or a specific circumstance surrounding the particular offence. Schedule 5 contains almost the same kind of offences, including the offences of murder and rape, but without adding any qualification to these offences. The list of offences contained in Schedule 6 and Schedule 5 is important because of the *onus* created by s 60(11) of the CPA. This section, as it now reads, with reference to Schedule 5 and Schedule 6 offences, places an *onus* on the accused, similar to the *onus* that existed under s 60(11) of the 1995 Act. The difference between these two subsections, however, is that the 1995 amendment only burdened a specific group of accused persons,[48] to convince the court that their detention is not needed, whereas the 1997 Act has spread the net much wider to include almost every accused person charged with a serious offence. In terms of this subsection it is further required of an accused charged with a Schedule 6 offence to satisfy the court that 'exceptional circumstances' exist to permit his or her release. This concept of 'exceptional circumstances' has been discussed earlier on and remains a controversial concept.[49]

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[46] It is ironic that despite the fact that the appeal of the accused against the denial of bail succeeded, the Court did not set the accused free. In light of the seriousness of the offence and in the interests of justice the court referred the matter back to the magistrate for hearing of further evidence to decide on the issue of bail. See *Jonas supra* at 581h-j.

[47] Another new schedule that was introduced by the legislation is Schedule 7 that refers to offences for which the prosecution may set bail in terms of section 59A of the CPA.

[48] See *S v Tshabalala* 1998 (2) SACR 259 (C). The Court held, with reference to the reverse *onus* in cases of s 60(11) of the 1995 Act, that the net set by the subsection is not too wide and affects only a specific group of people, namely those that have committed serious offences, which does not mean that the section is *per se* in conflict with s 35(1)(f) of the Constitution.

[49] Since the amendment came into operation there has been a spate of cases reported and unreported, all relating to the interpretation and the meaning of 'exceptional circumstances'. This in itself is indicative of the uncertainty created by the introduction of this concept. See *S v C* 1998 (2) SACR 720 (C); *S v H* 1999 (1) SACR 72 (W); *S v Schietekat* 1999 (1) SACR 100 (C); *S v Mokgoje* 1999 (1) SACR 233 (NC); unreported

The 1997 Act has further effected changes which, from the perspective of the offender, most probably offend against many of his fair trial rights; but these changes will not be discussed because they are not closely related to the rights of witnesses and victims. It is contended that the amendment to the CPA has unfortunately complicated the practice of law on issues that were clearly defined by past judgments and which required no transformation. My main criticism of the 1997 legislation is that it is a complex piece of legislation, with vague and undefined concepts, that will in all likelihood be struck down as being unconstitutional.[50] It does little to improve the position of witnesses in the criminal justice system. In fact, witnesses are adversely affected by the Act in that the question of bail now takes a considerable amount of time, which could have been more productively used to finalise cases, and which would have been in the interest of witnesses.[51]

My contention that the amendments to the bail legislation will not pass constitutional muster, has received some support from the High Court. The Cape High Court recently in the judgment of **S v Schietekat**[52] held that ss 60(4) to (9) and ss (11B)(c) of the CPA, as amended by Act 85 of 1997, are inconsistent with the provisions of the Constitution and referred the matter to the Constitutional Court for a final order on the constitutionality of these provisions in terms of s 172 of the Constitution. In **S v Joubert**[53] the Cape High Court also held that the very same subsections are unconstitutional and invalid in their entirety. Although the matter of **Schietekat** has been argued before the Constitutional Court the decision of that Court is still awaited.

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cases of the Cape High Court *Hendricks v State* (Case No A714/98 decided 1 October 1998); *Adams v State* (Case No A781/98 decided 6 October 1998); *Baron and Another v State* (Case No A830/98 decided 22 October 1998).

[50] For more comment on the new bail legislation, see B J King 'Comment on the new bail legislation' (1998) 1 *The Judicial Officer* 54.

[51] See Annual Report of Attorney-General for the Witwatersrand Local Division, 1997/1998 at 14. It has been reported that 5 out of 14 regional courts in the Johannesburg Magistrates' Court are occupied on a full time basis with bail applications, which in turn caused an increase in the number of cases per court per month, as well as an increase in the number of awaiting trial prisoners.

[52] 1998 (2) SACR 707 (C).

4.6 Interests of justice

In establishing whether the granting or refusal of bail is in the 'interests of justice' it is imperative to consider the meaning of this concept. To a certain extent the meaning has been clarified by the legislature in s 60 of the CPA and it is recommended that judicial officers should use these guidelines as a point of departure in their assessment of whether a detention or release of an individual will be in the 'interests of justice'. Judicial officers should bear in mind, however, that the list in terms of s 60 of the CPA does not contain a *numerus clausus,*[54] and that the meaning of 'interests of justice' should be left to judicial interpretation. Bail decisions since the 1995 amendments emphasise that presiding officers should acknowledge their new roles and new functions in dealing with bail applications.[55] Every presiding magistrate or judge is duty bound to consider what effect the release of the detainee will have on the 'interests of justice'. They should not merely act as neutral umpires in bail matters but have a duty to investigate each matter.[56]

In **S v Dhlamini**[57] the Court held that it was in the 'interests of justice' not to grant bail even though the state's case was weak. It was, however, held that there was *prima facie* evidence that the accused had participated in a shooting and that he was an extremely dangerous man, and that if he was released the risk existed that he would rejoin the taxi war and imperil others. The effectiveness of the 1995 Act was also demonstrated in the matter of **S v Tshabalala,**[58] where bail was denied on the sole ground[59] that the appellant would 'interfere' with prosecution witnesses. The Court, after a consideration of all the facts, held that there was a strong likelihood that the appellant would attempt to interfere with witnesses and that no stringent bail conditions could afford adequate protection to

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[53] 1998 (2) SACR 717 (C).
[54] P M Bekker 'Interpretation of the right to bail and the limitation clause of the Constitution of the Republic of South Africa' (1994) 57 *THRHR* 490.
[55] See *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Provinsiale Afdeling* 1994 (2) SACR 579 (W).
[56] This approach is confirmed by section 60(3) as introduced by the Second Criminal Procedure Act 75 of 1995.
[57] 1997 (1) SACR 54 (W).
[58] 1998 (2) SACR 259 (C)
[59] See s 60(4)(c) of the CPA, which covers this ground.

the witnesses.[60] It was held by the Court that in such circumstances the 'interests of justice', also in a constitutional sense, did not permit the appellant to be released on bail.

4.7 Witnesses and bail

It is not surprising that witnesses feel that in most instances they are powerless in the handling of 'their' cases.[61] It is primarily the prosecution[62] that renders assistance to witnesses during a criminal trial; but prosecutors have many other duties and have until now failed to render sufficient assistance to witnesses before the trial. Prosecutors should, however, not solely be blamed for the neglect of witnesses before the trial. With regard to bail it is clear that judicial officers are also not fulfilling their duties in terms of the Act.[63] They have failed to act more inquisitorially by investigating all the facts in a bail application, and have forsaken their duty towards the victims of crime. Judicial officers could be more innovative in setting bail conditions to protect the victims of crime. The mere fact that the court is granting the offender his/her liberty does not mean that the protection of the victims of the relevant crime should be abandoned.

I shall demonstrate the problem with the following example: In a serious assault or domestic violence case the presiding officer will find it difficult to order that the offender should move out of the family home but could afford protection to the victim of such violence by setting bail conditions: that the offender move out of the family home, stay away from the victim, attend counselling sessions and refrain from drinking etc. In doing so the interests of the greater society as well as those of the individual witness will be served.

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[60] *Tshabalala supra* at 273f-g.

[61] A distinction between the role of the offenders and that of the victims will precisely illustrate this statement, i.e. that offenders have the choice to actively participate in their trials or to be passive spectators, but victims don't have that choice unless they are chosen by the state to become witnesses in the trial. See M Maguire 'The impact of burglary upon victims' (1980) 20 *British Journal of Criminology* 261.

[62] To be more specific the different roles of public prosecutors will be investigated due to the pivotal role that they play in the administration of justice.

If one were to assume that the experience level of prosecutors has diminished, it becomes even more important that presiding officers should treat all parties fairly and justly. It is contended that in an attempt to grant such just treatment to victims of crime it is essential that the presiding officer acts inquisitorially to get all information on record before deciding upon the issue of bail.[64]

Bail conditions, other than financial incentives, may also be imposed by the presiding judge or magistrate, and should be imposed. The following are examples of conditions that do not involve financial incentives:

- a condition that the accused report at specified intervals to a nominated police station.
- a condition that the accused reside at a specific place.
- a condition that the accused undergo psychiatric treatment or psycho therapy.
- a condition that the accused participate in a program of rehabilitation or a counselling programme.
- a condition that the accused does not commit an act of violence and/or commit any act similar to that being charged with.
- a condition that the accused does not contact/communicate with the victim or any other state witness.
- a condition that he accused does not go to specific premises frequented by a specified person.
- a condition that the accused does not enter a specific district or area.
- where the accused resides with another person - a condition that the accused does not enter or remain in the place of residence whilst under the influence of intoxicating liquor or a drug.
- a condition that the accused surrender all existing passports to the authorities.

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[63] Section 60(2)(b)-(c) and 60(3) of the CPA, to name a few.
[64] See s 60(3) of the CPA.

4.8 Addressing the dissatisfaction of victims and witnesses

It is submitted that other practical steps should be considered in addressing the dissatisfaction of victims and witnesses in dealing with bail. The following proposals are aimed at making the bail system more witness-friendly:

- Public prosecutors should be more involved in dealing with witnesses, and consult with these witnesses also with regard to their safety should the accused be granted bail.
- Steps should be taken to ensure that there is better communication between witnesses and public prosecutors at both the pre-trial phase as well as the trial phase.
- Enough resources to prosecute criminals more vigorously should be allocated to the Department of Justice. Funds should be allocated to prosecutors to enable them to develop initiatives such as special gang courts and special bail courts. It is also important that throughout the criminal process, special waiting[65] rooms be provided for witnesses.
- A special data basis is needed which would enable the Department of Justice and the Police Services to share information about criminals. The provision of such a database would assist the state to properly oppose bail in matters which require the detention of the accused.

4.9 Pre-trial services

Pre-trial services may assist witnesses in various ways. One way would be to take care of their interests before bail is considered. An example of such a service is that offered by the Pre-trial Service Office at Mitchells Plain Court. The service, which is a practical,

[65] Witnesses do not have special waiting rooms at the courts and in most instances they have to wait, for their matters to be heard, in the passages or some drab place to which the accused and his family and friends have access. Courts like those at Wynberg and Cape Town are an exception to the general practice. At these courts provision is made for the witnesses to wait in a special room which is separated from the area where the

court based bail project, was unveiled by the Minister of Justice on the 29 August 1997. This service was the first ever in South Africa and was launched at the Mitchells Plain Court where the office of the project is also located. The project is a joint undertaking between the Department of Justice and the Vera Institute of Justice. The aim of the service is to create a system in which every accused person appearing at court is evaluated for bail at his or her first appearance. Where possible it will be recommended that offenders be released but at the same time it is aimed at ensuring that dangerous offenders be detained, and that if they are released that the release does not imperil witnesses. This is clearly a project from which witnesses can benefit. The Office informs witnesses about bail decisions and witnesses are invited to contact the bail officer if they experience any intimidation. Those witnesses that are intimidated can contact the Office immediately on a 24-hour telephone number.

The director of the project, Michelle Baird, has stated that 'if the Pre-trial Services Office is successful, more witnesses and more accused persons will return to court when expected. Cases will be resolved more quickly; and justice and police officials will have more time to dedicate to investigation of serious cases and collecting the evidence necessary for convictions. Pre-trial Services means increased access to justice for everyone.'[66]

It is submitted that projects like the Pre-trial Service Office are the kind of practical tools needed in the system. In addition to its practical advantages, the Office has the potential to improve the system by taking care of the needs of witnesses, and by offering them protection when intimidated, and by keeping witnesses informed of the progress of their cases. A recent study amongst 915 victims in Scotland showed that it is important to provide victims with information at the time of the bail decision, since they fear for their safety; and in most cases the absence of notification can heighten their fear and affect

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accused and his family must wait.

[66] See Editorial 'A new Pre-Trial Service system' (1997) December ed *Justice News* 1 at 2.

them adversely.[67] Some of the victims indicated that the uncertainty of not knowing was worse than the knowledge that the accused had been released on bail.

Without having done an empirical study it is difficult to say whether witnesses in the South African context share the same fears, but it has been my experience as a prosecutor that witnesses want to be informed throughout the process about the progress of their cases. If projects like the Pre-trial Service Office succeed in giving this information to them, then consideration should be given to an expansion of the project on a national level.

4.10 Concluding remarks

Bail is not an absolute right but it is a very important right to an individual who has not been convicted of any crime and who is presumed innocent until proven guilty. Witnesses can be protected in the system without infringing upon any constitutional right of the accused.[68] Tightening the laws, more specifically the bail laws, is not the solution to South Africa's crime problem. An effective criminal justice system will rather have the desired effect. This means that the interests of law enforcement and the wider community should be carefully weighed against the fundamental rights of the accused. It is not too late for the Department of Justice to address the deficiencies in the system that obstruct the proper utilisation of bail provisions, i.e. a lack of resources, a lack of trained and experience magistrates and prosecutors, and a good police service to enforce the law, to name a few.

Crime is much too serious a matter to be solved by merely adopting draconian legislation in areas such as bail. Such legislation may appear to be addressing the crime problem and affording better protection to victims of crime, whilst in fact it fails to achieve either objective. It is often said that one cannot change practices simply by changing the law. I want to venture the view that the system will only improve for witnesses and victims

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[67] See S R Moody 'Victims and Scottish Criminal Justice' 1997 *Juridical Review* 1.
[68] See 4.4 *supra* for a discussion of the 1995 amendments to the CPA.

once the Department of Justice changes the practices in the courts and offers better services to victims, such as the service offered by the Pre-trial Service Office.[69] Whilst it is highly important that victims, like Mamogethi Malebane and others, be protected against barbaric criminals, it is submitted that such protection should not be achieved by infringing upon the hard-won human rights of individual citizens.

[69] See discussion 4.9 *supra*.

Chapter 5

5. Rape, Rape Victims and the Criminal Justice System

5.1 The subject of the inquiry

> **Rape is the most vicious and reprehensible crime in the criminal calendar. Every individual possesses a core *persona* which makes up the essence of their being. It is an intensely personal and private self which necessarily includes the individual's sexuality and autonomy. Rape shatters a woman's sexual integrity and personal autonomy. Victims suffer acute trauma and endure lifelong psychological and emotional scars.**[1]

The study of witnesses in the criminal justice system will certainly be incomplete without a focus on rape victims and the treatment that they receive in the criminal justice system. One may ask why a distinction is drawn between rape victims and victims of other crimes and whether victims of rape should receive special attention in the present study. In answering these questions it is important to consider the public disquiet that has been vehemently expressed in the past decade regarding the handling of rape cases and the treatment meted out to rape victims who seek recourse through the criminal justice system. Furthermore it must be borne in mind that the position of rape complainants is not to be compared with that of victims of other crimes. Being held at gunpoint and forced to relinquish a valuable item cannot be compared validly with the violation of something as personal as one's sexual integrity and autonomy. It is because of these well-founded concerns that a review of the treatment of rape victims and the law relating to rape will be conducted as a matter of necessity.

Comments expressed regarding rape and rape victims have also added to the need to examine the problems created by the offence and the problems encountered by the victims due to the shortcomings of the substantive law and to evaluate existing

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[1] Justice E W Thomas in 'Was Eve merely framed; or was she forsaken?' 1994 *New Zealand LJ* 368 at 368.

evidential rules that impact on rape victims. Finally, some practical solutions to these problems will be considered and evaluated.

This chapter is, however, not concerned solely with public opinion but also with the concerns expressed by scholars such as Estrich, Brownmiller and Hall.[2] Statements made by these scholars are highly critical of the treatment given to complainants in rape cases; in fact they go so far as to state that the justice system discriminates, at every stage, against rape victims.[3] Whether these accusations levelled at the system[4] are correct remains to be seen. In order to investigate whether these accusations hold true for the South African experience, it is necessary to consider legal issues raised by the common law definition of the offence of rape and also to evaluate the treatment meted out to those testifying in our courts.

Whilst a plethora of material exists on this topic, most of it is based on feminist jurisprudence.[5] In order to remain objective while analysing the issues, it is important to exercise caution when relying on these writings as part of this analysis. Suffice it to mention that these, admittedly subjective views, serve as sufficient impetus to warrant a re-examination of the need for rape victims to be treated as a special category in the

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[2] See e.g. Susan Estrich *Real Rape* (1987); Susan Brownmiller *Against Our Will: Men Women and Rape* (1976); Colleen Hall *Sexual Politics and Resistance to Law Reform: A Critique of the South African Law Commission Report on Women and Sexual Offences in South Africa* (unpublished LLM Dissertation University of Cape Town 1987).

[3] See e.g. David P Bryden and Sonja Lengnick 'Rape in the Criminal Justice System' (1997) 87 *Journal of Criminal Law and Criminology* 1194.

[4] The treatment given to rape victims has been dubbed a 'second assault' on the victims. See generally E Williams and K A Holmes *The Second Assault: Rape and Public Attitudes* (1981).

[5] See generally Susan Estrich *Real Rape* (1987); C Smart *Feminism and the Power of Law* (1989); Susan Brownmiller *Against Our Will; Men, Women and Rape* (1976); Z Adler *Rape on Trial* (1987); Lisa Frohmann 'Discrediting Victims' Allegations of sexual assault: Prosecutorial Accounts of Case Rejections' (1991) 38 *Social Problems* 213; Pamela L Wood *The Victim In a Forcible Rape Case: A Feminist View* in Leroy G Schultz (ed) *Rape Victimology* (1975) 194; V Bronstein 'The cautionary rule: an aged principle in search of contemporary justification' (1992) 8 *SAJHR* 558; P Schwikkard 'Sexual Offences-the questionable cautionary rule' (1993) 110 *SALJ* 46.

criminal justice system, as does the prevalence[6] of the crime and the fact that sexual complainants constitute a special grouping of victims.

The prime areas of concern addressed in this chapter are the procedural difficulties that rape victims have to face in court, the treatment meted out to them, and the impact of the definitional limits of the crime itself on these victims. Much of the distress[7] suffered by rape victims is influenced by factors such as: the manner in which the police handle a complaint and a complainant, the manner in which medical personnel handle the medical examination, the manner in which the prosecution service handle a case, the trauma experienced throughout a rape trial and the accountability of the court personnel for these rape cases. It is factors like these, coupled with the knowledge of high acquittal rates for these offences, which make the prosecution of rape cases an unattractive proposition for the victims of the crime.

Through the exploration of the topic, it became apparent that a critical assessment of the functions fulfilled by all role-players is required in order to make useful recommendations regarding the handling of these victims in the court process.

While experience has shown that a number of the aforementioned shortcomings could be eliminated by changing certain perspectives and attitudes of the role-players, which can be seen in the discussion of the pilot project at Wynberg Court that will follow, other changes, however, should and could only be brought about by legislative reform. Through the research of this study it became apparent that a review of this area of the law must attempt to decipher influences, born of another age and era,

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[6] Recent national statistics on rape in South Africa received from the South African Police Services reflect that rape has been more prevalent than in previous years. In 1994, 42 429 cases of rape and 18 801 cases of attempted rape were reported. In 1997 the number increased to 52 160 cases of rape and 24 805 cases of attempted rape that had been reported. Because much of this study will concern itself with the incidence of rape in the Western Cape I considered the statistics for the region. In 1994, for example, 5 371 cases of rape and 2 441 cases of attempted rape were reported; the 1997 figures show that 6 558 cases of rape and 3 179 cases of attempted rape were reported. (Statistics released by the Area Commissioner of the West Metropole in a letter dated 7 December 1998.)

[7] The view expressed by Christopher Corns that sexual complainants in particular resent the treatment they receive in the system because the injury that they have

which have moulded and shaped the law that is now no longer in harmony with current societal attitudes and views.

5.1.1 The law governing rape

Rape is defined in our law as intentional unlawful sexual intercourse with a woman without her consent.[8] In short, the common law definition of rape centres on the penetration[9] of a specific part of the female's body, which excludes other forms of forced sexual conduct.[10] This definition is considered unduly restrictive in its application and it demonstrates a particular male bias.[11]

This anomaly and others that surround the definition of rape deserve discussion because these limitations of the definition of rape may exacerbate the trauma and in addition add to the anxieties experienced by rape victims in turning to the criminal justice system for recourse. An examination of the definition demonstrates that other non-consensual 'sexual' acts, like anal sexual intercourse,[12] which have the same reprehensible features as rape, cannot be charged as rape, even though the female or male victim may have experienced the very same trauma as an 'ordinary' rape victim. Another objection to the definition, and one which is closely related to the previous objection, is that the definition excludes male victims. Forms of 'male rape' have been treated in our law as either sodomy[13]or indecent assault. Although reform is therefore required, it is, however, not my intention to discuss all the shortcomings of

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suffered is far more personal than that of other victims. See W F McDonald (ed) *Criminal Justice and the Victim* Vol VI (1976) 23.

[8] See C R Snyman *Criminal Law* 3 ed (1995) at 424; Burchell and Milton *Principles of Criminal Law* 2 ed (1997) at 487; P M A Hunt *South African Criminal Law and Procedure* Vol II Common Law Crimes 2 ed (1988) at 435.

[9] The slightest penetration of the vagina suffices in proving the offence. See Snyman *op cit* at 425. Cf. *R v Botha* 1916 (T) 365 at 366; *R v V* 1960 (1) SA 117 (T) at 117-118.

[10] Cf. *S v M(2)* 1990 (1) SACR 456 (N); *S v F* 1990 (1) SACR 238 (A).

[11] Colleen Hall 'Rape: The Politics of Definition' (1988) 105 *SALJ* 67 at 71-73.

[12] See *S v M(2)* 1990 (1) SACR 456 (N).

[13] The offence sodomy as known under our common law is no longer an option in our law since the offence has been declared unconstitutional by the Constitutional Court in a judgment delivered on 9 October 1998. See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (2) SACR 556 (CC).

the definition. What should however be emphasised is the fact that these shortcomings lead to immense frustration experienced by victims of sexual assault. They are either precluded from laying a charge of rape either because the injury suffered does not suffice for a charge of rape or because of their specific gender. The elimination of these shortcomings can only be brought about through legislative reform, which is required as a matter of urgency.

In 1982 the South African Law Commission investigated the definition of rape as part of its investigation of sexual offences committed against women.[14] In its report the Law Commission concluded that the law of rape as presently constructed is sound and that the offence need not be redefined.[15] It is submitted that the Law Commission in its evaluation failed to consider the social dynamics[16] or, even more importantly, the constitutional implications of the current definition. In its findings it appears that the difficulties that the offence poses for the criminal justice system were also overlooked.

First, the approach followed by the Law Commission seems to be extremely legalistic in that it concerned itself mostly with the prevailing law without considering the relationship[17] that the criminal law has to other laws of a similar kind.[18] Secondly, the

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[14] See South African Law Commission Project 45 *Report on Women and Sexual Offences in South Africa* (1985) para 2.1-2.21.

[15] See Report *op cit* para 2.21 for its recommendation.

[16] See Colleen Helen Hall *Sexual Politics and Resistance to Law Reform: A Critique of the South African Law Commission Report on Women and Sexual Offences in South Africa* (unpublished LLM Thesis University of Cape Town 1987) at 68-70.

[17] Another important issue that was not dealt with satisfactorily by the Law Commission was the common law position that a husband cannot rape his wife. Under the common law it was held that a married woman could not charge her lawful husband with rape in circumstances where he forcibly had sexual intercourse with her without her consent. By marrying him she irrevocably consented to afford him all the marital privileges in the future, including the right to have sexual intercourse with her without her consent at all times. The untenable situation that existed for married victims has fortunately changed and it is now unlawful for a man to rape his own wife. Should he force her to have intercourse with him in circumstances where she refuses to consent to the act he could be charged with a contravention of s 5 of the Prevention of Family Violence Act 133 of 1993. See Burchell and Milton *op cit* at 491.

[18] The Law Commission in its evaluation merely disregarded the views held by other interested parties, like Rape Crisis, and placed too much reliance on the collective opinions of justice personnel. See Report *op cit* at para 2.12-2.18.

investigation conducted by the Law Commission seemed to overlook the factors that influence the way sexual offences are processed through the justice system.

As a result of the Law Commission's recommendations, the offence has remained an archetypal gendered[19] crime: the victims are female and the perpetrators are overwhelmingly male. This brings me to the point that our rape law, as it is presently defined, is discriminatory,[20] in that all sexes do not receive fair and equal protection before the law. It discriminates[21] on the basis of a person's sexual orientation, which in turn affects one's right to be equal[22] before the law. In fact it is my submission that

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[19] See J I Welch 'Verkragting, met spesifieke verwysing na die transseksueel wat 'n "geslagsverandering" operasie ondergaan het' (1991) 4 *SACJ* 164.

[20] See s 9(1) of the Constitution which prohibits 'unfair discrimination'. In *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 31 the Court considered what constitutes 'unfair discrimination':

> Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period in our history during which humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied recognition of their inherent dignity... In our view unfair *discrimination*...principally *means treating persons differently* in a way *which impairs their fundamental dignity* as human beings who are inherently equal in dignity.(Emphasis added)

[21] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 112 for an examination of s 8(2) of the interim Constitution (now s 9(3) of the Constitution):

> The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of s 33 of the interim Constitution.

[22] See s 9 of the Constitution that provides as follows:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

the Law Commission should re-examine the offence, but this time within a constitutional frame. Consideration should be given to other jurisdictions that have succeeded in treating all sexes fairly before the law. Canada, for example, has reformed its rape offences so as to be sex neutral and to cover both homosexual and heterosexual conduct. The crime as defined under the Canadian system views the offence as a crime of violence and not a sexual offence.[23]

The Canadian Criminal Code provides as follows:

Sexual Assaults[24]

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(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race gender sex pregnancy marital status ethnic or social origin colour sexual orientation age disability religion conscience belief culture language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[23] See J Temkin *Rape and the Legal Process* (1987) at 101.

[24] The offence assault is defined in terms of the Canadian Criminal Code as follows:
265. (1) A person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
(b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on unreasonable grounds that he has, present ability to effect his purpose; or
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or casing bodily harm and aggravated sexual assault.
(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
(a) application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud; or
(d) the exercise of authority.
(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the

271. (1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Sexual Assault with a weapon, threat to a third party or causing bodily harm.

272. (1) Every person commits an offence who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant; or

(d) is a party to the offence with any other person.

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for a term not exceeding fourteen years.

Aggravated Sexual Assault

273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

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evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

It is submitted that whilst the Canadian model is easy to follow in that it creates a single three-tier offence,[25] which replaces offences like rape, attempted rape, sexual intercourse with a feeble-minded,[26] and indecent assault on a male or a female, it in reality offers no improvement to our existing rape laws. The only positive achievement through reform along the lines of the Canadian example would be the equal treatment of all sexes. Offences like assault and indecent assault could, if suitably modified serve the same purpose in our law, without any changes to the law.

In South Australia law reformers succeeded in broadening the offence of rape to include most forms of physical penetration of the female body. In New South Wales,[27] the definition in s 61 of their Crimes Act 1900 provides that 'sexual intercourse' means-

(a) Sexual connection occasioned by the penetration of the vagina of any person or anus of any person by

(i) any part of the body, or

(ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes;

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;

(c) cunnilingus; or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

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[25] J Temkin *op cit* at 102.

[26] Section 15 of the Sexual Offences Act 23 of 1957.

The reform in Australia once again treats males and females alike before the law but at the same time it broadens the definition sufficiently to include penetration of orifices other than the vagina. The reform however leads to the fact that the crime is graded by providing different degrees of 'rape'.[28] Furthermore certain statutory provisions[29] overlap with some common law crimes like assault[30] to do grievous

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[27] For a discussion of the law reform in Australia, see Jocelynne A Scutt *Women and the Law* (1990) at 469-471.

[28] In New South Wales the four levels of gradation of the offence are set out in section 61B-E of the Crimes Act 1900. The section reads as follows:

> 61B (1) any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with the other person shall be liable to penal servitude for 20 years.
>
> (2) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 20 years.
>
> 61C (1) Any person who-
>
> (a) maliciously inflicts actual bodily harm upon another person; or
>
> (b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument
>
> with intent to have sexual intercourse with the other person shall be liable to penal servitude for 12 years...
>
> 61D (1) Any person who has sexual intercourse with another person with the consent of the other person and who knows that the other person does not consent to sexual intercourse shall be liable to penal servitude for seven years or if the person is under the age of 16 years to penal servitude for 10 years...
>
> (2) For the purpose of subsection (1) a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse...
>
> 61E (1) Any person who assaults another person and at the time of or immediately before or after the assault commits an act of indecency upon or in the presence of the other person shall be liable to imprisonment for 4 years or if the other person is under the age of 16 years to penal servitude for 6 years...
>
> (2) Any person who commits an act of indecency with or towards a person under the age of 16 years or incites a person under the age to an act of indecency with that or another person shall be liable to imprisonment for 2 years...
>
> (3) For the purposes of this Act a person who incites a person under the age of 16 years to an act of indecency as referred to in subsection (2) shall be deemed to commit an offence on the person under the age of 16 years.

[29] See criticism by Jocelynne A Scutt *op cit* at 473.

[30] See s 61B(1) of the Crimes Act 1900.

bodily harm and indecent assault.[31] Again, it offers no solution to the South African problem.

One final comment is necessary regarding the definition of the offence. In its report the Law Commission[32]found the following argument against reform of the crime to be persuasive: that a shift in the emphasis from a sexual act to a violent act would not divert the attention from the element of consent. This is because the Law Commission found that rape and assault are fundamentally different: 'the essential element of rape is sexual intercourse without consent while the essential element of assault is the application of violence without consent'.[33] It is my submission that in taking such a stance the Law Commission overlooked the fact that a shift of focus, from a crime of sex to a crime of violence,[34] may indeed divert attention from the element of consent. It may even solve most of the problems encountered with the element of consent. I shall try and explain briefly without digressing into a new field of research.[35] If the offence is treated as an offence of violence, then absence of consent[36] need no longer remain an element of the crime. A shift in emphasis will mean that mere submission to sexual intercourse by the complainant, in instances of fear and intimidation, will no longer be used as proof of consensual sexual intercourse. It is submitted that consent[37] will then no longer serve as a ground of justification and that the question of consent would be circumvented in treating the offence as a violent crime rather than a sexual crime. It is conceivable, however, that such a proposal may be too controversial to adopt without a thorough research of all the common law sources.[38]

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[31] See s 61E of the Crimes Act 1900.
[32] See South African Law Commission Report *op cit* para 2.15.
[33] *Ibid.*
[34] Scholars like Bryden and Lengnick, in support of this view, argue that changing the name of the crime from rape to sexual assault, or some similar term, could help to change the public's perception, i.e. that the crime is motivated by a desire to have sex when it is in fact motivated by a desire to dominate. See David P Bryden and Sonja Lengnick 'Rape in the Criminal Justice System' (1997) 87 *Journal of Criminal Law and Criminology* 1194 at 1197.
[35] For a more detailed discussion of the Law Commission's inattention to redefine the offence as an offence of violence, see Hall's discussion *op cit supra* at 67-69.
[36] For a discussion of the concept of consent in our Criminal Law, see Snyman *op cit* at 117-118; Burchell and Milton *op cit* at 198-215.
[37] See 5.1.3 *infra* for an in depth discussion of this element of the crime.
[38] See Snyman's discussion of the origin of the offence *op cit* at 424.

Another obstacle, which should be recognised when dealing with the formulation of the definition of the offence, is that rape victims have to endure the trauma of disclosing their most intimate experiences when testifying in court. An examination of the definition shows that the nature of the offence is extremely intimate and private, which inevitably intensifies the trauma of witnesses giving evidence in court.[39] The fact that a woman is required to specify the specific body part penetrated by the 'rapist' for the purposes of proving the offence, adds to her feeling of vulnerability. Carol Smart puts the extreme intimacy of the offence, which distinguishes it from other offences, in perspective when she says that, in giving evidence in a rape trial, the witness's body becomes the primary focus of her testimony. She states:

> Bits of female anatomy are heavily encoded with sexual messages and women are aware, whether consciously or not, of the sexual meaning of parts of their bodies or the movement of their bodies. In a rape trial she knows that she must name parts of her body, parts which in the very naming overtly reveal their sexual content. She must talk in public of her breasts, her vagina, her anus, and of course what the accused did to those parts of her sexualized body, and with what parts of his body.[40]

Until recently the only protection that could be claimed by adult sexual victims was to request[41] to give their testimony *in camera*.[42] They would, however, be much better protected if s 153 of the CPA stipulated that all sexual offence cases should be conducted *in camera* as a matter of course and without exception.

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[39] This view is supported by the Heilbron Committee's Report *The Advisory Group on the Law of Rape* cited by J Temkin 'Sexual History Evidence - the Ravishment of Section 2' 1993 *Criminal LR* 3 at 3-4. The Committee held that one of the worst aspects for complainants to deal with is the routine of delving into their private lives, personal habits and sexual history.

[40] See C Smart *op cit* at 38-39. Cf. V Bronstein 'The rape complainant in court: an analysis of legal discourse' in C Murray (ed) *Gender and the New South African Legal Order* (1994) at 210-211.

[41] A prosecutor in terms of s 153(3) of the CPA lodges this request.

[42] See 2.4 *supra* for a discussion of the procedure applied to protect witnesses' identities in certain instances.

Such a proposed amendment would strip presiding officers of their discretion to grant an *in camera* hearing; instead, an *in camera* hearing would automatically be held for a sexual offence case. A recent amendment to s 158[43] of the CPA can perhaps be seen as an improvement in the trial process, in that it has the potential to alleviate the burden of victims that have to testify about intimate and personal details in court. This provision provides for testimony of witnesses to be relayed to the court, *via* closed circuit television.[44] A careful examination of the section demonstrates, however, that there is no substantial difference between this provision and s 153, as both sections give the presiding officer the ultimate say in deciding upon the application of both these provisions.

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[43] Section 158 of the CPA as amended might be of use in cases of rape but the 'special protection' afforded by the provision still depends on a discretion exercised by the presiding officer. The amendment to s 158 reads as follows:

> (2)(a) A court may subject to section 158 on its own initiative or on application by the public prosecutor order that a witness or an accused if the witness or accused consents thereto may give evidence by means of closed circuit television or similar electronic media.
> (b) A court may make a similar order on application of an accused or a witness.
> (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-
> (a) prevent unreasonable delay;
> (b) save costs;
> (c) be convenient;
> (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
> (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
> (4) The court may in order to ensure a fair and just trial make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right by means of that procedure to question a witness and to observe the reaction of that witness.

[44] It is too soon to tell whether s 158(3) would afford protection to those victims who are older than 18 years but fear the accused's presence in court. Considering the interpretation that the Cape High Court adopted in the unreported case of *S v Francke* (Case No SS 22/98 decided 5/05/98 – Butterworths judgements on line [1999] JOL 4451 (C)) it is doubted that the provision can be used to give such protection to witnesses. Albertus AJ held that s 158(3) of the CPA makes severe inroads into an accused's procedural rights and for that reason ought to be restrictively interpreted. The Court held that in order to succeed with an application in terms of s 158(3) of the CPA, the party requesting such order from the court needs to prove that subsections (a), (b) and (c), and either (d) or (e), are satisfied, before such order will be granted.

5.1.2 Focussing on the element of consent

Consent[45] forms such an integral part of the definition of rape and plays such an important role in proving the offence that it justifies special discussion. In analysing the definition it should be obvious that much of the success in proving the offence against the accused depends on the woman's unwillingness to have sexual intercourse with the offender. In principle, her non-consent is viewed as the most important element of proving the crime. If, after her testimony, any doubt exists regarding the non-consent to sexual intercourse, the required *mens rea* and probably the required *actus reus* would not have been proved and the accused will in all probability be acquitted on the rape charge. A defence of consent raised by the offender immediately places a burden on the victim to prove that she did not consent to the act.[46]

Once again the focus is on the victim and the way *she behaved*[47] at the time of the offence. Historically this has led to the belief that *she must have demonstrated* some

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[45] In dealing with the element of consent, in his discussion of the rape victim, Justice Thomas maintains that the social meaning of consent is perceived to be inherently tied to a system of unequal sexual relationships in which the man actively initiates the sexual encounter and the woman is relegated to the more passive role of responding to his initiatives. Like many feminist scholars, he supports the notion that the approach adopted by the criminal law to the offence of rape reflects a male-dominated culture. See Justice E W Thomas *op cit* at 369.

[46] The Tasmanian Law Reform Commission (1982) expressed the same view in its Report but in a more forceful way:

> The present focus on consent virtually demands that a defence counsel who is doing his job properly must challenge the sexual conduct and personal integrity of the complainant and attempt to present her in the most unfavourable light.
> (Para 44)

The Criminal Law and Penal Methods Reform Committee of South Australia in a Special Report: *Rape and Other Sexual Offences* (1976) also noted at 24:

> Lack of consent of the victim as one of the key external elements of rape is clearly a problem. It creates difficulties for the jury (in interpreting its meaning), for the victim (in focusing the trial on her behaviour) and for the Crown (in endeavoring to overcome the stereotyped notions of consenting sexual relations from which the jury is likely to derive its interpretation of consent).

[47] See H A Snelling 'What is Non-Consent (In Rape)' in Leroy G Schultz (ed) *Rape Victimology* (1975) at 160 who advocates that a jury's task would be much simplified if the legal criterion determining consent was only the woman's behaviour and not her inward state of mind as well.

physical resistance[48] to prove non-consent at the time of the rape.[49] Moreover, this expectation led to the fact that when a defence was based on consent, it was invariably accompanied by an attempt to demonstrate that the complainant was of bad character or even a prostitute, a woman of easy virtue, and that she had consented to the act. Defence counsel have argued over the years that this kind of character evidence is relevant to the issue of consent, it being contended that certain kinds of women would be more likely to consent to sexual intercourse than others.

The issue of consent received pertinent attention in 1976 with a decision of the English House of Lords in **Director of Public Prosecutions v Morgan.**[50] This case concerned the accused Morgan and three others who were convicted of forcibly raping Morgan's wife. Morgan's liability was based on the fact that he assisted the other three to rape his wife. The Court of Appeal affirmed the convictions but certified the following question to the House of Lords:

> Whether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds.

What made this decision so controversial is that the court held that as long as a man honestly believes that a woman is consenting to sexual intercourse, then it is irrelevant whether the belief is reasonably held, in other words it is irrelevant whether he is actually mistaken in his belief.[51] Morgan, and three of his friends, had intercourse with Morgan's wife. According to Mrs Morgan she never consented to have intercourse with any of the men and protested and struggled throughout the act. The defence however claimed that the three appellants believed that she was consenting to the intercourse because Morgan told them that she was 'kinky' and that she got turned on by a struggle. The trial court convicted the appellants despite their assurance that

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[48] S Estrich *op cit* at 29.

[49] Ann V Mayne and Ann Levett in their article 'The Traumas of Rape – Some Considerations' (1977) 1 SACC 165 at 165 attribute the blame for such perception to the fact that the crime is incorrectly emphasised as a crime of consent versus non-consent and not as one of violence.

[50] [1976] AC 182.

they honestly believed that she consented to the act. The appeals of the appellants were dismissed, but the majority of the House of Lords decided the question in the negative. In other words, negligence was not sufficient to establish the required *mens rea* for rape. This decision caused a furore among the public and some critics have gone so far as to call the Morgan decision a 'rapist charter'.[52] Despite the public outcry, the case was nevertheless welcomed by criminal law academics.[53] The untenable situation that prevailed after the Morgan decision was fortunately promptly met by legislative reform[54] to prevent further injustices of the same kind in the United Kingdom. Since the law in South Africa requires that a man must intend to have sexual intercourse with a woman knowing or foreseeing that she has not consented to the intercourse,[55] it is submitted that an accused charged with rape in South Africa will in all likelihood not succeed with a defence of mistaken belief to escape liability.

Another aspect of consent that requires discussion is that, in the absence of physical injuries or physical violence, the trial becomes even more focussed on whether the woman would have said 'yes' to the offender. The perception that an 'ideal' rape is committed through force is also closely tied to the traditional perception that an 'ideal' rape is committed by a stranger rather than a known person.[56] Despite the fact

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[51] For a discussion see Simon Gardner 'Reckless and Inconsiderate Rape' 1991 *Criminal LR* 172 at 172.

[52] See G Fletcher as quoted by Richard Singer and Martin R Gardner *Crimes and Punishment: Cases Materials and Readings in Criminal Law* 2 ed (1996) at 511.

[53] See letters to *The Times* 7 May and 8 May 1975 by Professor J C Smith and Professor Glanville Wiliams as quoted by Sanford H Kadish and Stephen J Schulhofer *Criminal Law and Its Processes - Cases and Materials* 6 ed (1995) at 322 and 323.

[54] Parliament enacted s 1(1) of the Sexual Offences (Amendment) Act (1976) which provided:

> A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

[55] See Burchell and Milton *op cit* at 497.

[56] Susan Estrich in her autobiography *Real Rape* states as follows:

> In many respects I *am a very lucky rape victim* if there can be such a thing. Not because the police never found him: looking for him myself every time I crossed the street as I did for a long time may be even harder than confronting him in a courtroom. No I am lucky because everyone agrees that I *was 'really' raped.* When I tell my story no one doubts my status as a victim. No one suggests that I was 'asking for it.' No one wonders at least out loud if it was really my fault. No one seems to identify with the rapist. His being black I fear

that there are other crimes[57] for which consent is just as important a defence, it is only in rape charges that lack of consent remains insufficient to prove non-consent.[58] Notwithstanding the fact that resistance is not required to prove that the woman did not consent to the rape, it remains a yardstick used by the courts to determine whether the complainant consented to the rape or whether she was forcibly raped by the offender.[59] Some of the most important problems have been highlighted and should be re-considered in any reformulation of the definition in the future; these problems, however, should not been seen as the only problems that exist regarding the element of consent.

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probably makes my account more believable to some people as it did certainly with the police. But *the most important thing is that he was a stranger*; that he approached me not only armed but uninvited; that he was after my money and car, which I surely don't give away lightly as well as my body. As one person put it: 'You really didn't do anything wrong.'(At 3)(Emphasis added)

[57] Consent also plays an important role in the following common law offences: assault, theft and robbery.

[58] For an interesting discussion of the different standards of proving consent in a rape charge see Lani A Remick 'Read Her Lips: An Argument for Verbal Consent Standard In Rape' (1993) 141 *University of Pennsylvania LR* 1103 at 1103 *et seq.* Consent as a central issue in the law of rape is also discussed by Robin D Wiener 'Shifting the Communication Burden: A Meaningful Consent Standard in Rape' (1983) 6 *Harvard Womens Law Journal* 143.

[59] The mere fact that a woman has submitted to sexual intercourse due to fear or retribution does not mean that she consented to the act. This is eloquently stated by Murray AJA in *R v Swiggelaar* 1950 (1) PH H 61 (A) at 110:

> The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct apart from her words it is fallacious to take the absence of resistance as *per se* proof of consent. Submission by itself is no grant of consent and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman while persisting in her objection to intercourse is afraid to display or realises is useless.

Cf. *S v S* 1971 (2) SA 591 (A) at 596E-H.

5.2 Evidential problems

An evaluation of the existing rules of evidence regarding sexual victims truly reflects that the law has been slow in recognising and responding to societal changes.[60] This phenomenon could be ascribed to the fact that the rules of evidence, even though they are adjectival[61] in nature, are perhaps more fermented by policy than we have recognised. Ignorance of societal changes has led to the fact that the rules of evidence and procedure place the victims of sexual offences[62] and their conduct as much, or even more, on trial as the accused. In a rape trial it is the law of evidence that demarcates the different interests that come into play, i.e. on the one hand the protection granted to complainants in sexual offences, and on the other hand the attempt to balance all rights so that the offender receives a fair trial. I have already discussed the impact of cross-examination[63] on witnesses but contend that any study of rape victims should also include an evaluation of the following evidentiary rules: the rule governing previous consistent statements; the cautionary rule; and the procedural rule governing the disclosure of complainants' previous sexual history. These rules of evidence, which have hitherto impacted negatively on rape victims as witnesses in court, should be re-examined in order to determine their use in future.

5.2.1 Previous consistent statements

The rule that permits the admissibility of a previous statement by a sexual complainant as evidence in court is strictly an exception[64] to the general rule against self-corroboration. The origin of this exception can be traced to the Middle Ages

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[60] Scholars, like Armstrong, maintain that one of the most contentious evidential rules, namely the cautionary rule, is still based on Victorian notions from the nineteenth-century regarding a woman's behaviour and not on notions from the twentieth-century. See Alice Armstrong 'Evidence in Rape Cases in Four Southern African Countries' (1989) 33 *Journal for African Law* 172 at 172.

[61] The law of evidence forms part of adjectival law. See generally Schwikkard et al *op cit* at 29 for the distinction between adjectival and substantive law.

[62] The following offences could be classified as sexual offences: rape, indecent assault, incest, *crimen injuria* and certain contraventions of the Sexual Offences Act 23 of 1957.

[63] See chap 3 *supra.*

[64] See Hoffmann and Zeffertt *op cit* at 117.

when it was essential for a victim of rape to raise a 'hue and cry'.[65] It provides that a previous consistent statement made by a victim of a sexual offence is permissible as evidence during the trial. Effectively it meant that if a woman complained about the sexual intercourse, the complaint served as a rebuttal of any suspicion of untruthfulness of her statement. This rule is so unusual that it has been considered as a recognised exception to the general rule[66]governing the admissibility of evidence.[67] The importance of the previous consistent statement given by a complainant in a sexual offence case is described by many scholars[68] as relevant to the establishment of the consistency of the witness and not as corroboration of the complainant's testimony.[69] To be admissible, the following requirements should be met: the

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[65] J M T Labuschagne 'Die klagte by seksmisdade' (1978) 11 *De Jure* at 18-20.

[66] The general rule governing the admissibility of evidence is embodied in our CPA. In terms of s 210 of the CPA no evidence as to any fact matter or thing shall be admissible if it is irrelevant or immaterial in the sense that it cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

[67] For a discussion of this rule see Schwikkard et al *op cit* at 98-101; Schmidt *op cit* at 378-386; Hoffmann and Zeffertt *op cit* at 118; Du Toit et al *op cit* at 24-18 to 24-19; Kriegler *op cit* at 515-516. It seems that a similar practice existed in the Netherlands by which the victim was supposed to shout 'wapen wapen'. For a discussion of this practice see Van den Heever J in *R v Ellis* 1936 SWA 10.

[68] See Schmidt *op cit* at 385; Hoffmann and Zeffertt *op cit* at 118-120.

[69] See the judgment of Satchwell J in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) where the court emphasised that the purpose of admitting previous consistent statements in sexual offence cases, is only to show that a complainant has been consistent in her complaint. In this case the evidence of a psychologist who had placed the complainant under hypnosis where she had repeated her evidence was excluded as irrelevant. The defence had sought to introduce the expert testimony of the psychologist to prove that the statement of the complainant had to be true if it was repeated in such circumstances. The Court ruled that the admission of such testimony would usurp the function of the court in determining the truth or falsehood of the complainant's testimony. In *Holtzhauzen v Roodt* it was also held that there is in our law no *numerus clausus* of circumstances in which previously consistent statements can be admitted as evidence. It is submitted that the court erred in finding that no closed list of circumstances exists governing the admissibility of previous consistent statements. Our law has always recognised only a specified number of circumstances in which previous consistent statements will be permitted as admissible evidence. See Schwikkard et al *op cit* 97 and generally Schmidt and Zeffertt *op cit* par 50. See also D Zeffertt 'Law of Evidence' 1997 *Annual Survey of South African Law* 718 at 739 for a discussion of the case and, in particular, criticism on this latter point.

statement must have been made voluntarily and it must have been made within a reasonable time[70] after commission of the sexual offence.

Although this rule no longer applies in the original form[71] in which it was introduced to the law of evidence, it is still applied by our courts today. Proponents of the rule claim that the rule favours rape victims in that it supports the testimony of the complainant. Such arguments cannot be supported because not all rape victims respond in the same way after being raped.[72] The effect of the rule may very well be to affect a complainant's credibility adversely if she did not complain to someone shortly after being raped.[73] Burgess and Holstrom[74] found that, whilst it is commonly supposed that in the aftermath of the rape the victim will be hysterical and tearful, many victims have a controlled response in which they mask their feelings and appear to be calm and composed. Research has shown that silence is part of a series of post-traumatic responses, which are caused by crimes such as rape.[75] So the perception that a recent complaint may still favour a rape victim's credibility is quite unjustified.

What makes this rule even more controversial is that, although it cannot be used as corroboration of the complainant's testimony, the absence or lateness of a previous

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[70] Reasonable time has been interpreted by the courts as being the first reasonable opportunity. See *R v C* 1955 (4) SA 40 (N). See generally the discussion by Schwikkard et al *op cit* at 100.

[71] See S E van der Merwe 'Die Toelatingsgrond en Bewyswaarde van Klagtes in Seksmisdade' 1980 *Obiter* 86 at 86-92; more specifically regarding the development of the rule at 87.

[72] It seems that the rule is based on another myth, namely that the natural reaction of any sexual complainant is to immediately tell someone about the offence. Research by Temkin *inter alia* has shown that most victims are too embarrassed to tell anyone, let alone to do so spontaneously and early, as is required by the rule. See J Temkin *op cit* at 145-146.

[73] It appears that this view is shared by the South African Human Rights Commission which stated in a submission to the Justice Portfolio Committee in a public hearing on *Violence Against Women* that in instances where a 'first report' is not made, complainants' credibility is challenged on the grounds that they should have complained. See submission W28 para 3.1.

[74] A Burgess and LL Holmstrom *Rape Crisis and Recovery* (1979) at 36. Cf. *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 779B where expert testimony was admitted with regard to the different responses demonstrated by rape victims after being raped.

[75] Morrison Torrey 'When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Persecutions' (1991) 24 *U.C. Davis LR* 1013 at 1015-1016.

statement can be used by the defence to cast doubt on the credibility of the rape victim. The South African courts have held that lateness of a complaint about the rape can be considered an adverse factor in determining the trustworthiness of a complainant.[76] In **R v M,**[77] an appeal against a conviction of rape, Schreiner ACJ made the following remarks:

> In his judgment Snyman AJ, after summarising the evidence said that if the complainant had made a report immediately after the incident the case would have presented very little difficulty. He then said that the Court had gone very carefully into the question whether the absence of an early report by the complainant was not perhaps due to the fact that she had not been raped, as she stated, but had intercourse by consent with some person other than the appellant. In particular the learned Judge said that the Court had examined the possibility that she had had connection with Willem, with whom she had been alone in the veld for something like half an hour. The Court found that Willem gave his evidence very well and was truthful; his denial that he had had connection with the complainant was accepted. And the Court was satisfied that the *complainant's delay in reporting the matter* was due to her being shy and sensitive, and also possibly to her mother's being over-emotional and on that account a person to whom her daughter

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[76] See *S v De Villiers en 'n Ander* 1999 (1) SACR 297 (O). In this matter the complainants made reports one year after they were raped. On appeal the Free State High Court held that such lateness of these reports would affect their credibility adversely; and Cillié J held with reference to this delay as follows:

> Die feit dat die klaagsters, volgens die getuienis so lank gewag het voordat die aangeleentheid openbaar is, is 'n verdere faktor teen die aanvaarding van hulle getuienis. Die datums waarop hierdie gebeure sou plaasgevind het, was volgens alle aanduidings aan die begin van 1995. Die klagtes is eers in 1996 gemaak nadat daar tugtiging op van die klaagsters uitgeoefen is. *Die beginsel is dat die klaagster in 'n seksuele midryf by die eerste geleentheid wat dit redelikerwys van haar verwag kan word, haar klagte behoort te opper. Hoe langer die tydsverloop hoe groter die moontlikheid dat die verhaal 'n versinsel is.* Trouens, die feit dat die klaagsters eers na verloop van 'n lang tydperk en 'n aantal vorige geleenthede daartoe kla kan juins die teenoorgestelde effek as die normale hê, naamlik dit kan dien as bewys van die onbetroubaarheid van die klaagsters.(At 306b-d)
>
> (Emphasis added)

[77] 1959 (1) SA 352 (A).

> might find it difficult to unburden herself. So regarding the matter the Court did not find that the complainant's *delay in reporting provided a sufficient reason for doubting* her truthfulness.[78]

In other jurisdictions also it becomes apparent that rape victims have had to bear the risk of appearing untruthful if they did not complain about the rape shortly after it occurred. In **Kilby v The Queen,**[79] Barwick CJ in the High Court of Australia said the following:

> It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining *whether to believe her*, they could *take into account* that she had made *no compliant at the earliest reasonable opportunity*. Indeed in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given.[80]

It is submitted that there is no longer a sound basis for retaining this exception[81] to the general rule of admissibility in our law and that it should be discarded. It has become necessary to re-consider the use of this rule in our law, particularly since the cautionary rule in sexual offence cases has now been abolished.[82]

Ultimately if one considers the concept of corroboration[83] as applied in our law of evidence then one cannot but be convinced by the view expressed by Chief Justice

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[78] *M supra* at 357B-E. (Emphasis added.)
[79] [1973] 129 CLR 460.
[80] *Kilby supra* at 465. Emphasis added.
[81] Other academics, like Murphy, are just as puzzled about the basis of the rule. In fact he goes so far as to state: 'It must be confessed that if ever there was some reasoned basis for the exception about to be discussed it has become well hidden in the mists of time.' See Peter Murphy *Murphy on Evidence* 5 ed (1995) at 452.
[82] See discussion of the cautionary rule at 5.2.2 *infra*.
[83] Lord Reid in *DPP v Kilbourne* [1973] AC 729 at 729 defines the concept corroboration in the following words:

> There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or

Hiemstra in **S v M**[84] that there is no ground of admissibility in our law of evidence such as 'consistency',[85] and that it is in essence nothing other than 'admissible self-corroboration.'[86] Van der Merwe supports the view of Hiemstra CJ regarding the fact that consistency is not a recognised ground for admissibility in the law of evidence. He maintains however that consistency is to be distinguished from self-corroboration.[87] In support of his argument he states that the previous consistent statement made by the victim cannot be considered as corroboration of the victim's testimony because it is not emanating from an independent source. But this is exactly why the complaint should not be considered as admissible evidence. To prove that something is consistent with something else said or done, is nothing other than

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> circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.

See also Peter Murphy *op cit* at 495 who states that the word corroboration 'means support or confirmation'.

[84] 1980 (1) SA 586 (BH).

[85] See the judgment by Ridley J in *Rex v Osborne* [1905] 1 KB 551 in particular at 558 wherein the court held:

> Such complaints are admissible not merely as negativing consent but because they are consistent with the story of the prosecutrix. In all ordinary cases indeed the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class and in them such statements ought under proper safeguards to be admitted.

The learned judge examines the rule further and then states at 560:

> These complaints are to be admitted not only because they bear on the question of consent but also because they bear on the probability of her testimony in a case in which without such or other corroboration reliance might not be placed on her testimony.

[86] Self-corroboration can be defined as corroboration emanating from the source itself. See *DPP v Kilbourne supra* at 456:

> We must be astute to see that the apparently corroborative statement is *truly independent* of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements we should not accept them as corroborative. And the law says that a witness *cannot corroborate himself.*(Emphasis added)

If corroborative material must flow from an independent source then it is submitted that cases of self-corroboration are not meeting the admissibility requirement of emanating from an independent source and is merely a repetition by the witness himself. See *People v Williams* [1940] IR 195 at 200 where Sullivan CJ formulated corroborative material as 'independent evidence of material circumstances tending to implicate the accused in the comission of the crime with which he was charged.'

[87] See S E van der Merwe 'Die Toelatingsgrond en Bewyswaarde van Klagtes in Seksmisdade' 1980 *Obiter* 86 at 92.

looking for support for the statement of the complainant. Once considered as 'support'[88] for the credibility of the complainant's statement, it can be nothing but corroboration of the complainant's testimony. It appears that other academics, like Labuschagne,[89] support the view that the previous consistent statement fulfils a corroborative function.[90] If this is so, then the rule inherently violates the general rule of admissibility of evidence, which excludes self-corroborated testimony and should not be supported on any premise. It is submitted that the rule should be abrogated through legislative reform. In Canada, for example, the adverse effects of this rule were abrogated by legislation that improved the treatment meted out to sexual complainants in court.[91]

5.2.2 Cautionary rule

Another example, which illustrates the law's distrust of rape victims, is the cautionary rule as applied by our courts until recently. Much of the suffering of rape victims

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[88] See *DPP v Hester* [1973] AC 296 at 315 where Lord Morris said:

> The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and *support* that which as evidence is sufficient and satisfactory and credible...(Emphasis added).

[89] See J M T Labuschagne 'Versigtigheidsreëls by Seksuele Sake: Opmerkings oor die Mensregtelike Begrensing van die Bewysreg' 1992 *Obiter* 131 at 134.

[90] *Ibid* at 134. The author chooses however to rely on the Canadian case of *Trimm v R* (1981) 59 CCC (2d) 396 (SC) in support of his argument. In the aforementioned case the court held as follows:

> That exception was recognised as necessary to negate the adverse effect the alleged victim's silence might have on her credibility when relating the circumstances of the offence and if essential to the commission of the offence or simply averred by the victim the victim's credibility when asserting absence of consent. That possible adverse effect is predicated upon the assumption that the true victim of a sexual offence will under normal circumstances complain at the first reasonable opportunity. Early complaint evidence seeks to negate the inference that could otherwise be drawn from the victim's silence as a result of that assumption.(At 402)

[91] See s 277 of the Canadian Criminal Code, which provides for the abrogation of rules relating to the evidence of recent complaints in sexual cases. Whilst some may argue that such a provision will be detrimental to the case of the complainant because the prosecution will no longer be in a position to tender such testimony, others may be of the view that such an abrogation of the rule is to the advantage of a complainant because no longer will she have to justify why she did not respond immediately by making a report after the rape. See the comparative analysis undertaken by J Temkin *op cit* at 146.

could be ascribed to the operation of this infamous rule that subjected victims to the experience of having the truth of their complaint doubted. To understand this phenomenon it is necessary to look at the history of the rule, and to consider certain myths and attitudes associated therewith.[92]

The cautionary rule is a rule of practice that developed over many years. According to this rule courts should exercise caution in evaluating certain kinds of evidence.[93] One of its applications was in the evaluation of the testimony of complainants in sexual offences. This 'corroboration warning'[94] by the courts made the cautionary rule extremely questionable.[95] It required that the evidence of complainants be treated with

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[92] For a discussion of the some of the myths, prejudices and attitudes that existed with regard to women that cry rape - see Louise Fryer 'Law versus prejudice: views on rape through the centuries' (1994) 1 *SACJ* 60.

[93] The rule is generally followed in the evaluation of the following witnesses for example: single witnesses, accomplices, child witnesses, complainants in sexual cases and in cases of evidence of entrapment. For a discussion of the rule see Schwikkard et al *op cit* at 388-392; Hoffmann and Zeffertt *op cit* at 572-584; Schmidt *op cit* at 121-131. See *S v Avon Bottle Store (Pty) Ltd and Others* 1963 (2) SA 389 (A) and the *dictum* of Botha JA:

> It is clear that the cautionary rule requires no more than an appreciation by the trier of fact of the risk of false incrimination...(At 393F-H)

[94] This 'corroboration warning' derived from the English common law requirement that trial judges warn juries of the dangers of convicting on the uncorroborated evidence of accomplices and sexual complainants. It was however finally abrogated by s 32 of the Criminal Justice and Public Order Act 1994 in the United Kingdom. See Murphy *op cit* at 496-497.

[95] Questioning the justification for this common law approach, Susan Estrich in her book *Real Rape* at 54 and 55 states the following:

> The cautionary instruction is the final example of the institutionalisation of the law's distrust of women victims through the rules of evidence and procedure. Juries are always told.... that they must be convinced beyond a reasonable doubt of the defendant's guilt. In rape cases since the 19th century they have also been told sometimes in Hale's own words that they must be especially suspicious of the woman victim. In a fairly typical version of the instruction the jury is told 'to evaluate the testimony of a victim or complaining witness with special care in view of the *emotional involvement* of the witness and the *difficulty of determining the truth* with respect to alleged sexual activities carried out in private'. All women who are forced to have sex therefore have an 'emotional involvement' in the event and are not to be totally trusted in their recounting of it.(Emphasis added)

caution; and because the majority of complainants are overwhelmingly women, they in consequence suffered unfair discrimination.[96]

In **S v J**[97] the South African Supreme Court of Appeal was given an opportunity to reconsider its approach to the controversial question of the cautionary rule that hitherto has been applied in sexual offences cases. An examination of the rule as applied in these cases shows that it was traditionally founded on the belief that the normal rules of evidence and procedure, designed to prevent an incorrect conviction, were considered insufficient to protect the accused against the wiles of complainants in sexual cases, and, in particular, rape cases. Over the years, a number of reasons were proffered for upholding the rule: the belief that complainants in sexual offence cases are inclined to use this easily laid charge to further their own ends, or that complaints are based on events that are the imagined product of a hysterical mind. Many of these claims referred back to the infamous statement of Lord Chief Justice Matthew Hale[98] some three centuries ago, that bringing a rape charge was 'easy' and that the charge was 'difficult to refute'.[99] All the blame cannot, however, be pinned on the Lord Chief Justice, because even Sigmund Freud was of the opinion that women unconsciously want to be raped:

> [A] woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation.[100]

Wigmore in a similar vein stated:

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[96] See *S v D* 1992 (1) SACR 143 (Nm) at 146f-h. See Dawie Fouché 'Die versigtigheidsreël in gevalle van seksuele wangedrag: *S v D and Another* in oënskou' (1993) 6 *Consultus* 50. Fouché argues that the rule is not discriminatory in nature and although the article was written by him before the judgment delivered in S *v M* 1992 (2) SACR (W) he is in full support of the view held by the court in *M*.

[97] 1998 (2) SA 984 (SCA).

[98] Although the cautionary rule that existed in most Anglo-Saxon jurisdictions derived from Hale's view, Anna Clark, in a study of rapes of the 18th and 19th century in England, maintains that some of the mistrust and myths that existed regarding women can be attributed to the fact that seduction was confused with rape. See Anna Clark *Women's Silence Men's Violence* (1987) at 4.

[99] See Susan Estrich 'Rape' (1996) 95 *Yale LJ* 1094; *S v J supra* at 1008e-f.

> The unchaste (let us call it) mentally finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such plausible tale.[101]

These and similar statements led our courts to believe that they should be on the lookout for a 'multiplicity of motives' that might inspire a complainant to lay a false[102] charge of rape. These perceived motives ranged from an attempt to conceal consensual intercourse from disapproving parents, revenge for the rejection of sexual overtures; the financial incentive to implicate a man able to provide adequate support for the child of the pregnant complainant; to being 'overcome by feelings of shame, disgust or remorse', sexual frustration and even 'flights of fancy' to which women are, stereotypically, supposedly prone.[103]

An examination of the realities of laying a charge of rape and of following it through to its conclusion in court, reveals that these 'motives' are themselves best described as flights of fancy. In dealing with the preposterousness of the corroboration warning in cases of sexual assault, Ian Dennis writes:

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[100] See note 'Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard' (1952) 62 *Yale LJ* 55 at n85.

[101] *Op cit* para 924A. Citing the discoveries of 'modern psychiatry' Wigmore *op cit* at 736 warned that women's testimony is untrustworthy:

> Their psychic complexes are multifarious distorted partly by inherent defects partly by diseased derangements or abnormal instincts partly by bad social environment partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men.... Judging merely from the reports of cases in the appellate courts one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed.

[102] Recent research has shown that the proportion of false rape charges is negligible and perhaps as low as 2% a figure that is comparable to other criminal offences. See David P Bryden and Sonja Lengnick 'Rape in the Criminal Justice System' (1997) 87 *Journal of Criminal Law and Criminology* 1194 at 1198.

> It is truly extraordinary to say that all female victims of sex crimes are presumed to be perjurers or fantasists unless the jury is convinced otherwise... As a result of [Bagshaw] women victims are treated less favourable by the law of evidence than mental patients, to whom a general corroboration requirement does not apply.[104]

Bringing a rape charge is by no means an 'easy' thing to do. A rape victim who has suffered what the Supreme Court of Appeal in **S v Chapman**[105] has described as 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim', would undoubtedly be reluctant to approach the authorities to be subjected to repeated, prying questions of potentially insensitive police officers and the harsh, invasive medical examination that must follow any allegation of rape. Should a victim nevertheless have the courage to proceed with the charge and the matter subsequently comes to trial, she will then once again have to relive the trauma through a distressing court process.[106] Not too long ago the South African Law Commission noted the following criticism against the application of the rule:

> This rule discriminates against the female sex and testifies to an insulting and false assumption that by its very nature a woman's evidence must automatically be approached with suspicion. If it is borne in mind that a complainant is often the only witness to rape, the application of the rule is a telling example of the alleged second victimisation since the complainant is clearly subjected to the experience of having her word doubted.[107]

Notwithstanding this criticism, the Law Commission in its report recommended that

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[103] See *R v W* 1949 (3) SA 772 (A) at 788; *S v M* 1992 (2) SACR 188 (W) at 190f; *S v Balhuber* 1987 (1) PH H 22 (A) at 44; *S v F* 1989 (3) SA 847 (A) at 854H-I.

[104] Ian Dennis 'Corroboration Requirements Reconsidered' 1984 *Criminal LR* 316 at 326.

[105] 1997 (2) SACR 3 (SCA) at 5b.

[106] See *S v J supra* at 1008e-g in support of this view and Catherine MacKinnon *Towards a Feminist Theory of the State* (1989) at 179.

[107] South African Law Commission Project 45 *Report on Women and Sexual Offences in South Africa* (1985) para 3.57.

there be no changes to the cautionary rule[108]as applied by the courts. It is submitted that the recommendation to retain the rule in its conventional form and the statement that the rule is in no way related to or partially responsible for the trauma experienced by rape complainants, were extremely short sighted and without foundation.[109]

Despite the realities highlighted above the courts have persisted in their belief that various grounds might motivate complainants to implicate an accused falsely.[110] Courts have adhered to this rule in a very rigid manner. Non-compliance with the rule resulted more than once in convictions being overturned on appeal. Before the decision in **S v J** it was required that trial courts should acknowledge the need to adopt a cautious approach to the testimony of this class of witnesses and, in addition, that judgments should reflect that the testimony had indeed been cautiously evaluated and that the court had not merely been paying lip service to the rule.[111] This resulted in the application of a 'double' cautionary rule where the complainant was (as is so often the case) a single witness for the state. Consequently, complainants testifying in these matters had to overcome an onerous burden premised on mistrust. No such burden was imposed on any other witness testifying on behalf of the state in any other criminal trial.

Fortunately **S v J** has finally changed this invidious position.[112] The important facts of **S v J** were these: The complainant, a 17 year old schoolgirl, testified that she was spending the afternoon with her sister and friends when they met the appellant, a

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[108] *Op cit* para 3.69-70.

[109] Cf. *S v J supra* at 1009e-g.

[110] See for example Schreiner JA in *Rautenbach* 1949 (1) SA 135 (A) at 143:

> It is not only the risk of conscious fabrication that must be guarded against; there is also the danger that a frightened woman especially if inclined to hysteria may imagined that things have happened which did not happen at all.

Further the *dictum* of Lewis AJA in *R v J* 1966 (1) SA 88 (R) at 92A-B:

> In the case of all females alleging sexual assaults the need for similar caution in the absence of corroboration flows from the fact that such charges are easily laid and difficult for the accused to disprove and a multiplicity of motives may exist for their being falsely laid. This has been recognised since time immemorial and a classic example of such false charge can be found in the Biblical story of Potiphar's wife and Joseph.

[111] Cf. *S v F supra* at 852h-853c; *S v S* 1990 (1) SACR 5 (A) at 9b-d; *S v M supra* at 190d-e; *S v Mayiya* 1997 (2) BCLR 386 (C) at 393e.

[112] Not only was the decision welcomed by academics and other writers but it was also welcomed by organisations such as Rape Crisis. See B Pithey 'Sexual Assault and the Law' No 26 *Policy Watch* 12 May 1998 at 2.

policeman known to the complainant. The appellant then gave driving lessons to some of the girls in the group. These 'lessons' led to the appellant and complainant ending up alone in his car. They then had a few glasses of beer and he started to kiss her. She pulled away but he overpowered her and succeeded in throwing himself upon her. She tried to fight him off but succceded only in scratching him on the forehead. He persisted and had sexual intercourse with her. However, her shouting and screaming soon made him desist and that gave her an opportunity to jump out and run away.

The complainant later told her sister and friend in a hysterical state that she had been raped by the appellant. This accusation was repeated to the appellant when he returned to the group: he denied the accusation. Both the complainant and the appellant were examined by the district-surgeon subsequent to the charge being laid. The complainant's version was corroborated by her sister. Testimony of the district surgeon also provided some corroboration of the evidence of the complainant in that it confirmed a slight degree of penetration.

The appellant's version of the events differed from what complainant stated in all material aspects. He denied that he had exposed himself to her or that he had attempted to rape her. When the appellant was examined by the district-surgeon scratch marks were found on his forehead and right ear. This he explained away as having being inflicted by his wife when she heard of the complainant's accusations against him. According to the district-surgeon the complainant was shocked when examined and experienced the examination as painful. He could not confirm full penetration but confirmed finding abrasions, which he considered reconcilable with unlubricated sexual intercourse. The regional court magistrate rejected the appellant's evidence as untrue and unreliable and accepted the complainant's version. On appeal to the Provincial Division the appellant argued that the regional magistrate had not properly applied the cautionary rule and therefore had not treated the evidence of the complainant with sufficient scepticism. The Provincial Division accepted this argument but confirmed the conviction on different grounds not relevant to this discussion.

Before the Supreme Court of Appeal the state defended the original judgment of the regional magistrate but argued that the cautionary rule should be rejected. It challenged the cautionary rule on the basis that it discriminates against women, and that it furthermore unjustifiably increases the burden of proof on the state in proving the guilt of an accused in cases of a sexual nature. After reviewing academic and legal literature on the development of the rule Olivier JA, writing for the Court, found that the rule was based on outdated stereotypes and expressed his disapproval of the cautionary rule.[113] Importantly too, Olivier JA acknowledged that there is no empirical evidence to support the suggestion that false charges are laid more often in rape cases than in other types of cases. The Court, after analysing various sources from other jurisdictions, came to the conclusion that 'the fact is that such empirical research as has been done refutes the notion that women lie more easily or more frequently than men, or that they are intrinsically unreliable witnesses'.[114] Judge Olivier set out the approach that should be adopted by the courts for the evaluation of witnesses generally.[115] This in essence seems to be that courts should not treat a witness's evidence with caution unless there is some indication, specific to the particular case, that there is a reason to do so.[116] It would appear then that caution would for example be called for if a possible motive for false testimony is objectively demonstrated. Furthermore it should be borne in mind that the cautionary rule does not alter the burden of proof, but is merely a rule of practice intended to remind a presiding officer to exercise a common sense approach when analysing the evidence of certain witnesses.[117]

Whilst the legal community has long awaited the decision of a nationally authoritative court on the continued existence of the cautionary rule and more specifically on the constitutionality of the rule, this was not the basis on which the Court decided the case. Although the Court referred on several occasions to the fact that the cautionary rule operates unfairly towards, and discriminates against, women, it did not make a

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[113] At 1009f-g.
[114] At 1008a-b.
[115] At 1009-1010.
[116] See *S v J supra* at 1010d-e quoting Lord Taylor's guidelines as set out in *R v Makanjuola: R v Easton* [1995] 3 All ER 730 (CA) at 733c-d.
[117] Cf. *S v Artman and Another* 1968 (3) SA 339 (A) at 341; *S v Mayiya* 1997 (2) BCLR 386 (C) at 392g-j.

single reference to the Constitution, which is unquestionably the ultimate repository and shield of citizens' rights. Legal commentators cannot be blamed for being optimistic that our highest court would make a declaration of some kind regarding the constitutionality of the rule. Hopes had previously been raised by the Supreme Court of Appeal in **S v Chapman**[118] that the rule would be rejected on constitutional grounds, for it had hinted (without deciding) that the cautionary rule might be struck down by a constitutional bludgeon. It seemed therefore likely that the court in **S v J** would deal with the cautionary rule in the context of the right to equality, particularly in light of the recent judgment of **S v Chapman**.[119] However it failed to seize the opportunity. The Namibian High Court had already led the way with **S v D,**[120]in which the Court held that the cautionary rule infringes upon the right to equality.[121] More recently the Cape High Court had echoed this with similar pronouncements in **S v M**[122] in which Davis AJ had emphasised that the cautionary rule should be applied in a manner consistent with the provisions of the Constitution. It was these pronouncements that had indicated to the legal community that the Supreme Court of Appeal was ready to deal with the constitutionality of the rule. But Rome was not built in a day and it should be borne in mind that this watershed judgment was delivered by the very same judge who not so long ago, in circumstances similar to those in this case, considered correctional supervision an appropriate sentence for two appellants convicted of the rape of a 19 year old virgin.[123]

Despite these criticisms it is submitted that that the Supreme Court of Appeal is deserving of praise for finally addressing its past errors by ruling that the testimony of victims of sexual offences should not be treated in the same manner as accomplices and children. It is a break with the past that finally grants 'sexual complainants' the same 'status' as any other witness who testifies on behalf of the state. The gist of the judgment of **S v J** is perhaps best captured in these words of Olivier JA:

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[118] 1997 (2) SACR 3 (SCA).
[119] *S v Chapman supra* at 4f-g.
[120] 1992 (1) SA 513 (Nm).
[121] *S v D supra* at 516H-I.
[122] 1997 (2) SACR 682 (C) at 685e-j.
[123] See *S v A* 1994 (1) SACR 602 (A).

> In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.[124]

The judgment should have a major impact on existing practices requiring corroboration in cases of a sexual nature. Presiding officers no longer have to apply the cautionary rule in evaluating the evidence of complainants on the sole basis that complainants in sexual offences have a motive for falsely incriminating the accused. What is required of presiding officers is that in determining the credibility of a witness they evaluate the testimony of such witnesses within the context of all the evidence available to the court. Any treatment of sexual complainants as witnesses, other than that meted out to ordinary witnesses, is no longer justified. To ensure that complainants in sexual cases receive equal treatment is an approach that is rational, sound and justifiable in terms of the protections guaranteed in the Constitution.

The Court's decision in **J** heralds a new era in South African law of evidence pertaining to the testimony of victims of sexual assault. In future accused persons in sexual offence cases will receive the same protection against false evidence as accused people in all other cases; the difference will be that complainants, who were treated with unjustified suspicion through the application of this rule in the past, will now receive proper and fair treatment.

5.2.3 Sexual history evidence

A discussion of the evidential rules pertaining to rape victims would be incomplete without an analysis of the procedures that mandate protection of the complainant's unrelated sexual past. Like so many other aspects of the offence it is again the nature of the offence that distinguishes it from others, and which exposes victims to

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[124] *S v J supra* at 1009e-g.

questions[125] and interrogations[126] of an intimate character. Victims may be required to answer questions about their unrelated sexual history which constitutes yet another impediment in the criminal process of bringing justice to rape victims. Personal questions about their sexual history impinge upon these witnesses in ways that differ from the ordinary rigors of being a witness in court. Professor Berger[127] depicts the awkwardness and the intimacy of the questions in the following words:

> For many people (especially in our society, women) the trauma of baring one's intimate past to the eyes of the world-*turning one's bedroom into a showcase-overshadows* the usual discomfort of testifying, or having others testify, to one's biases, lies or even convictions of criminal acts.[128]

Once again the focus is on the character of the complainant, and it becomes extremely important for two reasons: first to determine whether she consented to the act, and secondly, to determine whether she is a credible witness. It is submitted that in more than one way it is the credibility of the complainant in a sexual case that shapes the ultimate decision in a rape trial. Let me put it differently: if the complainant appears to be a credible and trustworthy witness then it is very likely that the offender will be

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[125] It is acknowledged that the phase most feared by rape victims is the phase of cross-examination. As McEwan commented: 'It appears to be thought legitimate to quiz them upon the way they care for their children what underwear they were wearing at the time of the alleged rape whether they use make-up and take trouble with their hair and upon the details of their menstrual cycles for no apparent reason other than to humiliate and embarrass them.' See Jenny McEwan *Evidence and the Adversarial Process - The Modern Law* 2 ed (1998) at 127. Justice Thomas *op cit* at 371, especially the discussion of rape victims' experiences in court. He describes cross-examination of rape victims as harrowing and a painful ordeal by which it will be required of these victims to keep on recalling the details of each incident over and over again.

[126] It is submitted that fear of such interrogation is one of the many reasons that so many rapes go unreported. See Shacara Boone 'New Jersey Rape Shield Legislation: From Past to Present - The Pros and Cons' (1996) 17 *Women's Rights Law Reporter* 221 at 223, stating that this fear of divulging their sexual past undoubtedly deterred the reporting of rape in the United States. It is however not only the United States that experiences low reporting levels but also Canada, Australia and New Zealand. See Susan M Edwards *Sex and Gender in the Legal Process* (1996) at 331.

[127] See Vivian Berger 'Man's Trial Woman's Tribulation: Rape Cases in the Courtroom' 1977 *Columbia LR* 1.

[128] *Op cit* at 41. (Emphasis added.)

convicted of the charge. At first blush this seems quite an easy obligation to fulfil: if the complainant is telling the truth then the state will succeed in proving its case. The realities however prove to be quite different.

The aforesaid is confirmed by a review of sexual history evidence in common law jurisdictions which supports the notion that throughout these jurisdictions such victims were treated with suspicion and distrust.[129] Because these victims were cloaked with distrust and suspicion, evidence of their prior sexual history was not only relevant as evidence but was considered material to the issues of consent and credibility. These concerns were succinctly described by Madam Justice L'Heureux-Dubé in the Canadian case of **R v Seaboyer**[130]

> At common law, the prior sexual history of the complainant was admissible on two issues, one material and one collateral. It was thought that 'unchasteness' was relevant to the material issue of consent and the collateral issue of credibility. In other words, women who had consensual sex outside of marriage were thought, in essence, to have a dual propensity: to consent to sexual relations at large and to lie.[131]

As a result of these rules regarding relevance which developed in the common law, defence counsel under the guise of relevance were permitted to delve into the moral character of the complainant by adducing evidence of her sexual past.[132] This process of interrogation about her conduct once again effectively placed the complainant 'on

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[129] See 5.2.2 *supra* for a discussion of some of the myths that surrounded women who cried rape and the mistrust of these women.
[130] [1991] 66 CCC (3d) 321.
[131] *Seaboyer supra* at 346b-d.
[132] The pedigree of the presumptions claiming that a complainant's sexual past is relevant to the issue of consent dates back to Hale who stated:

> The party ravished may give evidence upon oath and is in law a competent witness but the credibility of her testimony and how far forth she is to be believed must be left to the jury and is more or less credible according to the circumstances of fact that concur in that testimony. For instance if the witness be of good fame if she presently discovered the offence and made pursuit after the offender showed circumstances and signs of injury... these... give greater probability to her testimony.

trial' rather than the accused. Once more, the common law failed these witnesses. Their only hope was that judges would exercise their discretion in such a manner that they would be protected against irrelevant and prejudicial sexual history evidence adduced by the defence. That judges failed to offer protection to these complainants is well put by Sheehy:[133]

> What is clear... is that no common law system of discretion can possibly achieve the legislative objectives... The best, we can hope for will be diverse interpretations of the circumstances in which certain evidence is 'relevant' and constitutes a 'constitutional exemption'. These interpretations will vary from trial judge to trial judge across the country. The worst we might receive are expansive interpretations of 'relevance' which will be detrimental to women both individually and collectively. This is a particular concern, given the abysmal record of the Canadian judiciary under the common law, and under the modified common law regime of the old s 142, which was the impetus for the revocation of judicial discretion by Parliament.[134]

It is in this context that I will look at the measures and procedures adopted in Canada, the United Kingdom and the United States to shield rape victims from unnecessary questions about their sexual past and compare them to the protection offered by South African law.

(a) Canada

In Canada various amendments were passed over the past two decades to grant greater protection to complainants in sexual cases. One of the first amendments of these was s 142 of the Canadian Criminal Code,[135] which was aimed at alleviating some of the

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See Matthew Hale *History of the Pleas of the Crown* (1836) 1971 ed at 633.

[133] See Elizabeth Sheehy 'Canadian Judges and the Law of Rape: Should the Charter Insulate Bias' (1989) 21 *Ottawa LR* 741.

[134] *Op cit* at 782.

[135] Criminal Code R.S.C. 1970 c. C-34.

problems experienced by enquiries into the complainant's sexual past.[136] Section 142 is an excellent example of legislation that was well intended but flawed in its application by the judiciary. The Canadian case law demonstrates that the judicial interpretation of the provision in practice stripped these complainants of any benefit that might have accrued to them.[137] In **R v Forsythe** the Court went so far as to hold

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[136] Section 142 has since been re-enacted as s 276 of the Canadian Criminal Code. The current provision reads as follows:

> 276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with
> the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.
>
> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
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> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; and
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.

[137] See *R v Forsythe* (1980) 53 CCC (2d) 225.

that a complainant in a sexual offences case is compelled to attend the *in camera* inquiry to be held by the judge in terms of s 142. This meant that whereas complainants under the common law system had to face an interrogation during the trial, they were now faced with having to be interrogated twice by the defence if called upon by the defence to do so.

So, instead of minimising the agony of complainants the section effectively added to their distress and trauma.[138] The Canadian legislature however persisted in its endeavour to alleviate the victimisation of rape victims and responded by promulgating further reforms in 1982. The goal of this reform was the eradication of discriminatory rules and practices towards complainants in sexual offences cases. The principles of the 'new' reform as expressed by Jean Chretien, the Minister of Justice and Attorney-General at that time, reflect an incisive understanding of some of the difficulties rape victims have to face once they have turned to the criminal justice system for recourse. These are his words:

> The *inequality of the present law* has placed an *unfair burden on female victims* of sexual assault. It has *added to the trauma, stigma and embarrassment* of being sexually assaulted, and *has deterred many victims from reporting* these serious crimes to the police... Bill C-53 would alleviate the legal impediment, which allows this to occur... I am pleased to note that there appears to be widespread support for the four basic principles underlying the bill, namely the *protection of the integrity of the person*, the protection of children and *special groups*, the safeguarding of public decency, and the *elimination of sexual discrimination*.[139]

Section 142 was eventually repealed by ss 276 and 277 of the Canadian Criminal Code. These two sections became controversial because they severely curtailed the

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[138] See dissenting judgment of Justice Wilson in *R v Konkin* (1983) 3 CCC (3d) 289 at 295 where she refers to s 142 in stating the following; 'in effect s 142 instead of minimizing the embarrassment to complainants increased it'.

[139] See Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs Issue No 77 22 April 1982 at 77:29 as quoted by Justice L Heureux-Dubé in *Seaboyer supra* at 352f-h. (Emphasis added)

accused's ability to adduce evidence of sexual reputation and sexual history.[140] The aims of the reform were commendable but did not pass constitutional scrutiny. In **R v Seaboyer**[141] the Supreme Court of Canada declared s 276 of the Canadian Criminal Code to be of no force and effect on the ground that it was in conflict with the Canadian Charter of Rights and Freedoms.[142] The matter was finally addressed by enacting a new s 276,[143] which altered the old system of controlling evidence of sexual history. It allows for a discretion to be exercised by the judge in determining the relevance of the evidence being adduced. It is an improvement upon the old common law situation in that certain safeguards are included, limiting the discretion exercised by judges to prevent some of the injustices of the past. Some of these safeguards are that evidence of sexual activity will be inadmissible to support an inference that the complainant is likely to have consented to sexual activity on the

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[140] The sections that were challenged as being unconstitutional provided as follows:

> 276(1) In proceedings in respect of an offence under section 271, 272 or 273 no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other that the accused unless
> (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
> (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
> (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge where that evidence relates to the consent that the accused alleges he believed was given by the complainant.
> (2) No evidence is admissible under paragraph (1)(c) unless
> (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and
> (b) a copy of the notice has been filed with the clerk of the court.
> (3) No evidence is admissible under section (1) unless the judge provincial court judge or justice after holding a hearing in which the jury and the members of the public are excluded and which the complainant is not a compellable witness is satisfied that the requirements of this section are met.
> 277. In proceedings in respect of an offence under section 271, 272 or 273 evidence of sexual reputation whether general or specific is not admissible for the purpose of challenging or supporting the credibility of the complainant.

[141] *R v Seaboyer supra* n130.

[142] Specifically ss 7 and 11(d) of the Canadian Charter.

[143] The reform was brought about by Amendment Act S.C. 1992, c.38, s 2. See n136 *supra* for the amended section 276 of the Canadian Criminal Code.

occasion because she is less worthy of belief;[144] and that the evidence must be of significant probative value, which is not substantially outweighed by the danger or prejudice to the proper administration of justice.[145] The Canadian example gives much food for thought in the way that it limits the discretion exercised by judges. No longer do they have an unfettered discretion in determining whether sexual history evidence is admissible but are forced to take into account[146] the rights and needs of the complainants.

(b) United Kingdom

Rape law in the United Kingdom was considerably reformed after objections to the fact that defence counsel may almost cross-examine rape victims without the procedure being controlled were submitted by the Advisory Group on Rape to the Heilbron Committee.[147] The Committee in its report found *inter alia* that rape victims had to suffer a considerable deal in testifying and that sexual history evidence was frequently used to prejudice the jury against these victims.[148] The Committee held that the existing laws were in an unsatisfactory state and that they should be revised in line with the principle that in general the previous sexual history of a victim with other

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[144] See s 276(1) of the Canadian Criminal Code.

[145] See s 276(2)(c) of the Canadian Criminal Code.

[146] Section 273(3) of the Canadian Criminal Code provides that a judge shall take into account:

> (a) the interest of justice including the right of the accused to make a full answer and defence;
> (b) society's interest in encouraging reporting of sexual offences-clearly women will be less than anxious to report offences if they know their sexual past will be analyzed in court;
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case;
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
> (e) the risk that the evidence may unduly arouse sentiments of prejudice sympathy or hostility in jury;
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;
> (h) any other factor that the judge considers relevant.

[147] See the Criminal Law Revision Committee's Fifteenth *Report on Sexual Offences*, London HMSO (1984).

men (including evidence of bad reputation) ought not to be introduced as evidence. It was proposed that evidence relating to such past sexual history be firmly controlled. Its recommendation then resulted in the enactment of s 2 of the Sexual Offences (Amendment) Act of 1976 which provides as follows:

> (1) If at any trial any person is charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.
> (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence adduced or the question to be asked.
> (3) In subsection (1) of this section 'complainant' means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.
> (4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

Scholars, like Adler,[149] maintain that although the legislature offered rape victims greater protection through the enactment of s 2 of the Sexual Offences Act, such protection only existed in theory. The practice showed that evidence of sexual history was still admitted on doubtful grounds and that the decision-making in this area of the law was still tainted with prejudices against these victims.

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[148] *Op cit* at para 91.
[149] See Zsuzsanna Adler 'Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation' 1985 *Criminal LR* 769 at 770.

The case law does not reflect a more positive picture. In fact it shows that the interpretation adopted by the courts has not ruled out all questions that primarily relate to the credibility of the witness and not to an issue of the trial as required by s 2 of the Sexual Offences Act.[150] An evaluation of the decision of the Court of Appeal in **Viola**[151] demonstrates that the legislative reform did not improve the situation of victims because the final decision regarding the admission of their sexual past still remains with judges who initially contributed to the situation in which sexual history evidence was freely tendered in rape trials. Further, the courts have had a hard time distinguishing between matters of credibility and matters relating to the issues of the trial. The confusion relating to the distinction between matters of credibility and matters relating to the trial is manifest in the following passage quoted from the case of **Viola**:

> If the proposed questions merely seek to establish that the complainant has had sexual intercourse with other men to whom she was not married, so as to suggest that for that reason she ought not to be believed on oath, the judge will exclude the evidence... In other words, questions of this sort going simply to credit will seldom be allowed.... On the other hand, *if the questions are relevant* to an issue in the trial in the light of the way the trial is being run, for instance *relevant to the issue of consent*, they *are likely to be admitted*, because to exclude a relevant question on an issue in the trial as the trial is being run will usually mean that the jury are being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence being given by the complainant.[152]

Although the intention of adopting a provision like s 2 was to place an embargo on the use of sexual history evidence, the interpretation adopted by the courts reveals that it has not achieved its goal because the defence may apply to the judge, in the absence of the jury, for leave to include the very same evidence that was supposed to be excluded by virtue of s 2. In fact, the leading case of **Viola** raises more questions than

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[150] Section 2 of the Sexual Offences Amendment Act of 1976.
[151] [1982] 3 All ER 73 (CA).
[152] *Viola supra* at 77. (Emphasis added)

answers. Judges are still left with a discretion to finally decide upon the fairness of excluding the sexual history evidence, which is not a solution to a complex problem. Some judges have even held that past moral character is immaterial to the issue of consent and material only to the credibility of the witness, while others have held that the past moral character of the complainant goes to the very heart of the issue.[153]

(c) United States

In the United States of America the trend towards legal reform also began as early as 1970, when laws were passed that not only varied from state to state, but also varied in substance and complexity. A common approach is however noticeable in all the legislative amendments; and that is that they seek to limit the defence's ability to question the victim about her sexual past. The procedures adopted range from virtually an absolute prohibition on asking questions about the complainant's sexual past to an unfettered judicial discretion.

Most notable of all these enactments is the Federal Rape Shield Statute.[154] Since its enactment forty-six states[155] have enacted similar rape laws by incorporating the

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[153] See *Lawrence and Another* 1977 *Criminal LR* 492 as quoted by Susan M Edwards *op cit* at 348 for the formulation of the test to be applied in exercising the discretion. May J formulated it as follows at 493:

> The important part of the statute which I think needs construction are the words 'if and only if he [the judge] is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'. And in my judgement before a judge is satisfied or may be said to be satisfied that to refuse to allow a particular question or a series of questions in cross-examination would be unfair to a defendant he must take the view that it is more likely than not that the particular question or line of cross-examination if allowed might reasonably lead the jury properly directed in the summing-up to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were allowed.

[154] See American Federal Rule of Evidence 412 that provides as follows;

> *(a) Evidence generally inadmissible.*
> The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behaviour.
>
> (2) Evidence offered to prove any alleged victim's sexual disposition.
>
> *(b) Exceptions.*

Federal Rule of Evidence into their respective statutes, with varying degrees of restrictiveness. Professor Berger[156] uses the laws of Louisiana and to some extent also Michigan's statutes, as examples of states with rape shield laws that favour the victims. The law of Michigan shows that the exercise of defendant's rights should be balanced with those of the victims, or risk being struck down as unconstitutional. The Michigan rape shield law[157] prohibits a defendant from introducing at a trial evidence

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(1) In a criminal case the following evidence is admissible if otherwise admissible under these rules:
(A) evidence of specific instances of sexual behaviour by the alleged victim offered to prove that a person other than the accused was the source of semen injury or other physical evidence;
(B) evidence of specific instances of sexual behaviour by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the constitutional rights of the defendant.
(2) In a civil case evidence offered to prove the sexual behaviour or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must:
(A) file a written motion least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court for good cause requires a different time for filing or permits filing during trial; and
(B) serve the motion on all parties and notify the alleged victim or when appropriate the alleged victim's guardian or representative.
(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion related papers and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

[155] For a discussion of these states see Elizabeth Kessler 'Pattern of Sexual Conduct Evidence and Present Consent: Limiting the admissibility of Sexual History Evidence in rape Prosecutions' (1992) 14 *Women's Rights Law Reporter* 79 at 81-82.

[156] See Berger *op cit* at 33.

[157] Michigan Statute provides as per 750.520j of the Mich. Comp. Laws:

(1) Evidence of specific instances of the victim's sexual conduct opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
(a) Evidence of the victim's past sexual conduct with the actor.

of a rape victim's past sexual conduct, subject to exceptions. In **Michigan v Lucas,**[158] for example, the Supreme Court of the United States held that the refusal to admit evidence of previous sexual conduct between the complainant and the defendant, because the defendant failed to notify the prosecution as required by the 'rape shield' statutory provision, was not necessarily unconstitutional.[159] Justice O'Connor held:

> Accelerating the disclosure of this evidence did not violate the Constitution... because a criminal trial is not 'a poker game in which players enjoy an absolute right always to conceal their cards until played.[160]

(d) South Africa

In an evaluation of the South African situation it should be noted that the character of a complainant is only relevant to the extent that it relates to her credibility. Because the credibility of complainants plays such a pivotal role in dealing with their testimony it means that questions[161] concerning their character may lawfully be put to them. The only 'shield' that exists is that once they have answered questions relating

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(b) Evidence of specific instances of sexual activity showing the source or origin of semen pregnancy or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b) the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

[158] 500 US 145 (1991).

[159] In *Michigan v Lucas supra* at 150 Justice O'Connor stated the following:

We have upheld notice requirements in analogous settings. In *Williams v Florida* 399 US 78 (1970) for example this Court upheld a Florida rule that required a criminal defendant to notify the State in advance of trial of an alibi witnesses that he intended to call. The Court observed that the notice requirement 'by itself in no way affected [the defendant's] crucial decision to alibi witnesses... At most the rule only compelled [the defendant] to accelerate the timing of his disclosure forcing him to divulge at an earlier date information that [he] planned to divulge at the trial'.

[160] *Williams v Florida* 399 US 78 (1970) at 85.

to collateral issues,[162] the answers remain final and no further questions may be put to them on that point.

Earlier in this study I criticised the South African Law Commission for not condemning the cautionary rule in its report, yet some other recommendations of the Commission were more useful and have led to legislative change that has improved the position of rape complainants testifying in court. One of its recommendations has resulted in the adoption of s 227[163] of the CPA, which prohibits evidence of a woman's sexual history being led, subject to certain exceptions. One of these

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[161] See chap 3 *supra* for a discussion of questions put to complainants during cross-examination.

[162] The true test for determining a collateral issue was laid down in the old English decision of *Attorney General v Hitchcock* (1847) 1 Exch. 91; 154 ER. 38. In this case the court defined the test for determining a collateral issue as follows at 42 of 154 ER:

> .... the test whether the matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence - if it have (*sic*) such a connection with the issue that you would be allowed to give it in evidence - then it is a matter on which you may contradict him.

Wigmore *loc cit* paraphrases this test as follows at 657: 'Could the fact as to which error is predicated have been shown in evidence for any purpose independently of the contradiction?' See *S v Sinkankanka and Another* 1963 (2) SA 531 (A); *S v Damalis* 1984 (2) SA 105 (T).

[163] Section 227 reads as follows:

> (1) Evidence as to the character of an accused or as to the character of any female against or in connection with whom any offence of an indecent nature is alleged to have been committed shall subject to the provisions of subsection (2) be admissible or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May 1961.
>
> (2) Evidence as to sexual intercourse by or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed shall not be adduced and such female shall not be questioned regarding such sexual intercourse or sexual experience except with the leave of the court which leave shall not be granted unless the court is satisfied that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.
>
> (3) Before an application for leave contemplated in subsection (2) is heard the court shall direct that any person whose presence is not necessary may not be present at the proceedings and the court may direct that a female referred to in subsection (2) may not be present.
>
> (4) The provisions of this section are *mutatis mutandis* applicable in respect of a male against or in connection with whom any offence of an indecent nature is alleged to have been committed.

exceptions[164] is that questions relating to a complainant's sexual history may be asked when leave is granted by the court. From an examination of the content of s 227 of the CPA it appears that the character of the complainant in a rape trial will still remain relevant, in two instances: with regard to the chastity of the complainant and with regard to the issue of consent.[165] As such, despite the fact that the section is an improvement on the common law position, it still does not afford the same protection given to complainants in sexual offence cases in jurisdictions like Canada and the United Kingdom,[166] notwithstanding the fact that these provisions are themselves far from perfect from the perspective of victim protection.

Commentators, like Engelbrecht, are of the opinion that s 227 of the CPA offers sufficient protection to complainants and their character if the evidentiary principles of South African law are properly applied and adhered to by the courts.[167] The reality, it would seem, is that courts do not adhere to these rules of evidence strictly and properly. As a result complainants still have to face questions regarding their unrelated sexual past without the invocation of protection.[168]

(e) Evaluation of rape shield laws

Notwithstanding the greater protection afforded to victims of rape in the abovementioned jurisdictions, I am not convinced that the promulgation of similar laws will suffice to solve the problems that rape victims have to face in giving testimony in the South African context. The first criticism that may be levelled at these laws is that they fail to distinguish between the different purposes for which

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[164] See s 276(1) of the Canadian Criminal Code discussed *supra*.

[165] See S E van der Merwe et al *Evidence* (1983) at 95. For a discussion of the protection granted by s 227 of the CPA see Johan Engelbrecht 'Die karakter van die klaagster in verkragting en soortgelyke sake' 1984 *De Rebus* at 319.

[166] See s 2 of their Sexual Offences (Amendment) Act 1976 *supra*.

[167] See Engelbrecht *op cit* at 321: 'Binne die reëls van die bewysreg is daar egter voldoende beskerming vir die klaagster. Indien die beginsels korrek en streng toegepas word behoort die aflegging van getuienis geen vrees vir die klaagster in te hou nie. Haar karakter word voldoende beskerm.'

[168] See Sharon Stanton, Margot Lochrenberg and Veronica Mukasa *Improved Justice for Survivors of Sexual Violence? Adult survivors' experiences of the Wynberg Sexual Offences Court and Associated Services* (1997) at 131 - 132 for a discussion of the

evidence may be tendered in court. Whilst most of the legislation tries to address evidence of sexual activities, this is not the true issue that should be addressed in order to afford better protection to these victims. What should be addressed is the issue of the abuse of evidence of the sexual history of complainants for irrelevant and misleading purposes. Although one does not want to prevent the accused from defending himself against a charge that has been laid, one does not want the accused to abuse the process of cross-examination in order to get back at the complainant or to use her sexual past as a means of embarrassing her and putting her on trial.

Another criticism of the rape shield laws has been voiced by Justice McLachlin.[169] She feels that such legislation adopts a 'pigeon-hole'-approach,[170] which is not capable of dealing adequately with the evidentiary problem at stake, viz which evidence is relevant and not merely irrelevant. In her majority judgment in **Seaboyer**,[171] Justice McLachlin criticises the legislation as attempting to predict or forecast relevancy on the basis of a series of categories (pigeon-holes). Such an approach is inconsistent with the views of most scholars, who are of the opinion that the prediction of relevant evidence on the basis of defined categories, is impossible, because each decision regarding relevancy will depend on the merits of each individual case as it occurs. Given the criticisms that have been levelled at rape shield laws it is clear that the enactment of such laws in South Africa cannot be considered without a proper evaluation and analysis of all underlying evidentiary concepts that come in to play during a rape trial. Should legislative intervention be considered to improve the position of victims, it should be done with great circumspection and only once all the implications for victims have been evaluated. Finally it should be borne in mind that this kind of legislation is very prone to be unconstitutional[172] unless

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experiences of rape survivors when being cross-examined about their sexual past and their relationships.

[169] See *Seaboyer supra* at 397e-g.

[170] See David H Doherty 'Sparing the Complainant "Spoils" the Trial' (1984) 40 *CR* (3rd) 55 at 57 as cited by McLachlin J in *R v Seaboyer supra* at 388 in which he characterizes s 276 of the Canadian Criminal Code as calling for a mechanical 'pigeon-holding' approach to the question of admissibility based on criteria which may in a given case have little to do with the potential of the evidence

[171] See *Seaboyer supra* n130.

[172] See Professor H Galvin 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Debate' (1986) 70 *Minnesota LR* 763 at 814 where he

carefully designed not to impinge on the accused's right to challenge evidence[173] in a court of law.

5.3 The Wynberg Sexual Offences Court

It is considered that the legal discussion can be complemented by the practical experiences of the Wynberg Sexual Offences Court pilot project. The question that has remained unanswered hitherto is whether any special treatment should be accorded to rape victims over and above the procedural improvements proposed above. I have already pointed out that the system is not tailored to the needs of these victims; nevertheless victims in the Western Cape are far better off than those in the rest of the country. The significant change to the position of rape victims in the Western Cape was brought about by the establishment of the Sexual Offences Court in Wynberg.

It is submitted, without denying any of the specific role-players any credit that is due to them with regard to their endeavours to offer a better service to the victims of sexual offences, that the court would not have been initiated without pressure from the public and feminist lobby groups.[174] Much of the changed treatment, for rape victims in particular, is due to the efforts of the Wynberg Sexual Offences Court.[175] An

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has the following to say regarding a blanket exclusion with reference to the 'Michigan-model':

> ... many of the statutes fail to afford the accused the opportunity to present sexual conduct evidence which is indisputably *relevant and necessary* to the presentation of *a legitimate defense theory*. On one level the *problem is simply a failure to codify* a sufficient number of *exceptions*; the case law amply demonstrates the need to amend many of these statutes by providing more bases for admitting sexual conduct evidence. More significant however is the fact that the common element linking each of these relevant uses of sexual conduct evidence seems to have escaped the notice of the drafters-none requires reliance on the invidious common-law notions that a woman's consent to sexual relations with one man implies either consent to relations with others or lack of credibility. (Emphasis added)

[173] This right is provided for in s 35(3)(i) of the Constitution.

[174] Rape Crisis has played a major role in the creation of special services for rape victims in the Western Cape.

[175] Already in September 1992 a Task Group was set up to identify the problem areas in the treatment of rape victims at the hands of the police, district surgeons, prosecutors and judicial staff. The Task Group proposed a number of initiatives which

overview of the history of this court is important in order to understand the shortcomings in the system both before its inception and thereafter. Two cases triggered the development of a special system designed for rape victims: The first was a trial in which the district surgeon, who had examined an eight-year old victim, ignored a subpoena to come to court. The second case was an incident, in the same year, in which a magistrate made the comment - whilst sentencing the accused - that the victim was unlikely to have suffered much psychological damage because she was no longer a virgin at the time of the rape.[176] Both these cases sparked a lot of public criticism.

Proposals for reform were led by the Attorney-General of the Cape[177] working in liaison with women's movements, other non-governmental organisations[178] and also other governmental organisations[179] in the Western Cape. The Attorney-General decided to create a new system which would aim to provide better assistance to and support of rape victims throughout the pre-trial and trial process and which would also ease the procedures at court for adult and child victims.[180] The Department of

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had been considered by government agencies including the Attorney-General of the Western Cape, the Department of Justice, the Department of Health and Welfare and the Cape Provincial Administration.

[176] See 'Rape court can't handle all the cases' *Weekly Mail and Guardian* 4 November 1994 at 10.

[177] Adv F W Kahn SC.

[178] These organisations included *inter alia* Nicro Rape Crisis, Institute of Criminology at UCT, FAMSA, Lawyers for Human Rights and others.

[179] Through this initiative certain police policies were designed in handling of rape victims: a special comfort room was established where complainants could be examined at Victoria Hospital and not at the district surgeon's impersonal surgery. Further to this the Attorney General also issued general guidelines to all prosecutors setting out the new policies and urging them to be sensitive to the needs of these victims and to use the Wynberg court whenever necessary. See Attorney-General Circular 1/5/3 dated 26 April 1993.

[180] The following was said by Adv F W Kahn SC Attorney-General Western Cape as quoted in a paper delivered by EJS Steyn titled *Child abuse within the South African criminal justice system* 10th International Congress on Child Abuse and Neglect 10 – 13 September 1994, Malaysia at 3:

> One can always legislate to protect the victims of such rapes and sexual abuse but the really important issue is to ensure that one creates a system whereby competent prosecutors and defence counsel and sensitive presiding officers create an atmosphere where such victims are willing to come forward and report crimes which to a very large extent go unreported in South Africa.

Justice considered the aim of the court to be 'to effect more sympathetic and specialised treatment of plaintiffs and prosecutions.'[181]

In order to create a workable system special attention was paid to the dynamics of a multi-disciplinary team approach. What makes this court so special is that the prosecutions in this court are handled by a special team of prosecutors, who are identified and appointed not only on the basis of their experience but also on their ability to relate to victims of sexual abuse. In addition the court received more prosecutorial personnel[182] than other courts in order to attend to the needs of sexual victims. This was something that could not be done for other witnesses in the system due to personnel constraints.[183] Whereas prosecutors normally spend every day in court and conduct their consultations with witnesses in between appearances, the arrangement at the Sexual Offences Court was that prosecutors spend one day in court and the next day in the office to consult with witnesses and then prepare for their trials.[184] Another factor that makes this court unique compared to other criminal courts[185]is that it deals exclusively with sexual offence cases and that it is located on a different level to all the other regional courts. The location of the court is further distinguished by the fact that victims are given a special waiting room where they can wait in private before they are called upon to testify. This arrangement saves them the ordeal of facing the perpetrator before they have to testify. More importantly, the management of this court received constant monitoring from other professions and

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[181] See Annual Report of Department of Justice dated 1/7/92-30/6/93 at 97.

[182] Two prosecutors were assigned to this court and were assisted by a qualified probation officer from the Department of Welfare who served in the role of a victim assistance co-ordinator. The role of this officer was essential in the smooth running of the court because she referred victims for counselling and if the victim was a minor the necessary intermediaries were also organised by the officer if it was required.

[183] Most of this information was gained through my experience as Senior Public Prosecutor at Wynberg Court in the period 1992 to 1995.

[184] See San Vivier 'Wynberg Sexual Offences Court: impressions after a year in operation' 1994 *De Rebus* 569 at 569; 'Sexual Offences Court established' 1993 *De Rebus* 350.

[185] In general criminal courts hear all criminal cases that fall within their jurisdiction area, provided that the courts have substantive and punitive jurisdiction to hear these matters. For jurisdiction see s 19 of the Supreme Court Act 59 of 1959; ss 89 and 90 of the Magistrates' Courts Act 32 of 1944 and ss 110 and 111 of the CPA.

other non-governmental organisations through a special rape forum that met each quarter to discuss all obstacles and advances made through the term.[186]

Whilst the Sexual Offences Court has provided for an improvement of the services to rape victims, it is by no means perfect.[187] In fact, shortly after its establishment it struggled to cope[188] due to an increase in the caseload referred to it by courts from other jurisdictions.[189] The reason for transferring these cases was to ease the burden on the victims at other courts where no special facilities existed. The relocation of these cases is not above criticism because the women have to be transported from other areas, something which makes the court less accessible to these victims. It is thus an endeavour that is not without costs or inconveniences for victims. Suffice it to say that it has been a far better system than that which existed before and that the ideal would be to have special sexual offences courts in each and every jurisdiction country-wide to be used by rape victims.

5.4 Concluding remarks

From the discussion above it should be apparent that rape cases impose inordinate demands on the prosecution's ability to prepare and present these cases to the courts. If this discussion, which is not comprehensive in its coverage of the topic, would at the least lead to attitudinal changes on the part of the prosecution, defence and judiciary in dealing with rape victims in future, then the criminal justice system will be an improved system for rape victims in which they will no longer feel that they are 'on trial' for behaving in a certain manner.

On a more substantive level, I believe that a change or a recasting of the definition of rape is needed to include all victims irrespective of their gender. Another reform that

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[186] For a discussion of the usefulness of this Forum see Sharon Stanton and Margot Lochrenberg *Justice for Sexual Assault Survivors?* (1994) at 4.
[187] For a critical evaluation of the court see Stanton et al *op cit* at 4.
[188] Problems of the court are identified and set out in a study published by the Institute of Criminology - University of Cape Town. See n186 *supra*.
[189] A jurisdiction which referred a large number of rape cases to Wynberg was Mitchells Plain. The facilities at Mitchells Plain Court were appalling, hence the referral of these cases to Wynberg. See 'Rape not the only horror courts are too - mayor' *The Argus* 30 August 1994.

has been mooted is that the issue of consent be addressed in the reformulation of the definition of the crime. Consideration should be given to adopt reform similar to or along the lines of the New South Wales Crimes (Sexual Assault) Amendment Act of 1981, which makes the issue of consent irrelevant in certain prescribed circumstances.

A more pressing concern is the procedures that affect these complainants. It requires urgent consideration by either the courts or legislature. Cross-examination of rape victims is a major concern and throughout this study it has been demonstrated that rape victims are severely traumatised by the experience of cross-examination. It is time that the legislature puts an end to this ordeal. It is proposed that in order to alleviate the trauma of these victims, an accused be denied the opportunity to directly cross-examine a victim of a sexual offence,

In suggesting such reform I am not challenging any of the accused's rights to a fair trial; rather I am arguing that a provision akin to s 170A of the CPA be adopted, or that s 170 of the CPA be amended,[190] to grant all complainants in sexual cases the opportunity to use an intermediary system. A study of other jurisdictions reveals that similar provisions have been enacted to protect complainants from any direct cross-examination by the accused himself.[191]Although s 158[192] offers witnesses the opportunity to testify via closed circuit television it does not offer a complainant the opportunity to be questioned through a person appointed by the court and falls short of affording sufficient protection to victims. It is submitted that the proposed reform would survive constitutional scrutiny on the same grounds that that s 170A of the CPA survived constitutional challenge.

Finally, it should be recognised that the rule allowing the admission of previous consistent statements should be abandoned. This rule has become superfluous in the light of the abandonment of the cautionary rule and there is no reason for its retention in our law. It is contended, in conclusion, that if the rules affecting rape victims, discussed in this chapter, would be changed in future, such changes together with a

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[190] Section 170A currently only makes provision for young witnesses to testify through an intermediary and to be questioned by the intermediary. For a discussion of the provision see chap 6 *infra*.

[191] See ss 23(c) and 23(f) of the New Zealand Evidence Amendment Act of 1989.

more sensitive approach towards these victims would serve to affect an improvement of the system that is currently available for victims of sexual offences. Furthermore, if the rules affecting rape victims would be changed in future then such changes could also bring about changes in the views held by the society at large regarding women and their moral behaviour.

[192] As amended by s 7 of Act 86 of 1996.

Chapter 6

6. Child Witnesses

6.1 Introduction

> **'Let the jury consider their verdict,' the King said for about the twentieth time that day.**
> **'No, no!' said the Queen. 'Sentence first - verdict afterwards.'**[1]

Polemical as these words might seem, they capture the feelings of most people when confronted with the desperate situation of child witnesses in the system. Throughout this thesis I have striven to demonstrate that giving testimony in a court is not only a difficult experience for most witnesses but a terrifying one as well. In the discussion of child witnesses[2] in this chapter it will become even more apparent that the problems that witnesses encounter by testifying in court are much more acute when these witnesses are young and vulnerable.[3]

It will be shown that from the moment when children become involved with the system, problems begin to arise, which then gain momentum with the trial and escalate as the trial proceeds. Research has shown, for example, that the performance of children in court depends upon a number of factors such as the manner in which the

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[1] See Lewis Carroll *Alice's Adventures in Wonderland* re-issued ed (1994) at 134.
[2] Whenever the term child witness is used it refers to a person under the age of eighteen years, testifying in a criminal court.
[3] See generally D Libai 'The Protection of the Child Victim of a Sexual Offence in the Criminal Justice System' (1969) 15 *Wayne LR* 977. The factors influencing the children are aptly explained by Libai at 984:

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: *repeated interrogations* and *cross-examination*; *facing the accused* again; the official *atmosphere in court*; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testing; and the conviction of a *molester who is the child's parent* or relative.(Emphasis added)

trial is conducted and their understanding of the court process, to name a few.[4] The stark atmosphere of a courtroom filled with people dressed in strange clothes and asking strange questions of an intimate and embarrassing nature,[5] is another factor that could affect the testimony of children. This perception is confirmed by researchers and clinicians and identified as a major source of anxiety for many child witnesses.[6] Most noticeable from the research literature is the universal theme that criminal justice systems do not acknowledge the needs of child witnesses. As Bala[7] has pointed out:

> Children are victims of a discriminatory justice system which developed rules premised on the notion that children are inherently unreliable witnesses whose testimony must be specially scrutinised. The legal system has also discriminated against children by failing to recognise their unique characteristics and need for distinctive treatment.[8]

It is therefore essential to look at the system from the perspective of child witnesses to understand how they perceive the criminal process. Only then will one be in a position to evaluate the provisions that are made for child witnesses in the criminal justice system and to make recommendations that might bring about an improved system for them. It will be demonstrated that child victims, like rape victims, run into the same societal misperceptions, in that they are frequently thought to fantasize about sexual assault experiences and that they are allegedly unable to distinguish innocent behaviour from deviant sexual conduct. This chapter will address three major problems in the criminal justice system that exacerbate the emotional harm suffered by child witnesses, namely the procedural obstacles, the evidentiary difficulties that

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[4] See Anne Mellor and Helen R Dent 'Preparation of the Child Witness for Court' (1994) 3 *Child Abuse Review* 165 at 165.
[5] This statement is based on the premise that the case involves a sexual abuse.
[6] See R H Flin, Y Stevenson and G Davis 'Children's knowledge of court proceedings (1989) 80 *British Journal of Psychology* 285; K Freshwater and Jan Aldridge 'The Knowledge and Fears about Courts of Child witnesses, School Children and Adults' (1994) 3 *Child Abuse Review* 183.
[7] N Bala 'Double victims: Child sexual abuse and the Canadian criminal justice system' (1990) 15 *Queens Law Journal* 3.
[8] *Ibid* at 3.

these children have to overcome and then the impact of certain specific offences in respect of which only children are victims.

In a review of these problems the South African legal system will be discussed. The position of witnesses prior to the adoption of s 170A of the CPA and the position after this enactment will be considered and evaluated. Problems that arise from the fact that child witnesses are not afforded special protection and have to testify in a courtroom where they have to face the perpetrator will be examined.[9] This kind of victimisation has been severely criticised by a number of commentators and fortunately no longer prevails in South Africa.[10] However, child witnesses are considered to be disadvantaged by the adversarial trial system, aggressive cross-examination, and the neutral role exercised by the presiding officers in cases in which children are involved.

With an increase in crime in general child witnesses are today a far more common phenomenon than ten or fifteen years ago. Their involvement in the criminal justice process can stem from being victims of crime themselves or being eye-witnesses to crimes that are committed in their communities.

It is possible that using scarce resources to assist and protect child witnesses could be questioned by the public at large, particularly when other socio-economic needs, like housing and education, are borne in mind. The fact that South Africa has ratified the United Nations Convention on the Rights of the Child[11] on 16 June 1995[12] clearly requires the government to fulfil its duty towards all children. The ratification created

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[9] In terms of s 158 of the CPA, all criminal proceedings must take place 'in the presence of the accused'. Cf. *S v Motlala* 1975 (1) SA 814 (T); *S v Radebe* 1973 (4) SA 244 (O).

[10] See J J A Key 'The child witness: the battle for justice' 1988 *De Rebus* 54 at 55; M Reddi 'The child witness in the criminal justice system. Suggestions for reform' (1993) 18 *Journal for Juridical Science* 124; N Reddi 'The Child as a Witness' in Laura Pollecut et al (eds) *The Legal Rights of Children in South Africa* (1995) 128; J Engelbrecht 'Kindermolestering en verkragting: die howe se rol' (1995) 8 *Consultus* 20.

[11] The United Nations Convention on the Rights of the Child (1989).

[12] See G van Baeren (ed) *International Documentation on Children* (1993). Cf. W Amien and P Farlam *Basic Human rights Documents for South Africans* (1998) at 64 *et seq.*

an expectation that the government will demonstrate its commitment to the objectives of this Declaration, by ensuring that the best interests of children will prevail. These should include the protection of children in the criminal justice system. It is an obligation that is reinforced when this human rights document is read with the Constitution and the protection that it affords. Section 28[13] of the Constitution, and s 28(2) in particular, can be seen as constituting, as it were, a mini-charter of rights for children and child witnesses. The phrase 'every matter concerning the child' is broadly stated. It is therefore argued that the provision should include child witnesses even though there is no express provision that it provides specifically for the protection of child witnesses in the criminal justice system.

It is widely recognised today that child witnesses experience multifarious problems upon entering the criminal process. The South African Law Commission has

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[13] Section 28 of the Constitution provides as follows:

(1) Every child has the right –
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that –
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

emphasised the following problems as worthy of examination in cases of sexual offences against children:[14]

> (a) the secondary abuse suffered by children who are required to give testimony in adversarial courts, which are designed for adults;
> (b) difficulties associated with the functioning of the courts, including lack of appropriately trained personnel at all phases of the investigative and judicial processes;
> (c) the endless delays and remands due to the congestion of the court system;
> (d) problems experienced with the law of evidence;
> (e) the lack of independent (legal) representation for the child victim;
> (f) the absence of effective policies and procedures for bail and sentencing;
> (g) the lack of provision to enable victims and their families to survive and to ensure their safety if they pursue criminal charges; and
> (h) lack of the backup resources needed to enable the courts to make orders which are in the best interest of children and their families.[15]

Many of the problems emphasised are not unique to sexual offences but relate to all cases in which children have to testify. Finally, the problems relating to competency, out of court statements of children and cross-examining procedures will be investigated. It will be recommended, in conclusion, that legislative reform such as a special hearsay rule exception for children, special competency tests designed for children and the compulsory use of s 170A of the CPA in cases causing undue stress for the child witness, be adopted. These proposed reforms should be implemented in such a way that they do not deprive the accused of the right to a fair trial.

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[14] South African Law Commission Issue Paper 10 Project 108 *Sexual Offences Against Children* (1997).

6.2 Statutory protection of child witnesses

6.2.1 Hearings *in camera*

It is significant that the CPA acknowledges the need for child witnesses to testify in the absence of the public. Courts may direct that the criminal proceedings be held *in camera* in instances where the witnesses are younger than eighteen years.[16] Whilst it is vital that criminal justice should be administered publicly and openly,[17] it is also essential that young witnesses be protected from the public's presence in certain instances. The purpose of insisting on a public trial is generally to enable members of the public to be fully informed of the evidence, as far as it is possible to do so, and to allow them to evaluate any judgment.[18] The need of the public to see that justice is administered in court, however, must balanced against the right of child witnesses to be protected and the right of the accused to a fair trial. Whilst the enshrinement of the requirement of a public trial ensures that secret trials employed by totalitarian states will not be tolerated, it does not serve as an absolute guarantee that members of the public are entitled to be physically present in the courtroom at all times. In fact, s 152 of the CPA provides for criminal proceedings to be conducted in open court 'except where otherwise expressly provided'.

The need for criminal trials to be conducted publicly is succinctly stated by Brennan J in the matter of **Richmond Newspapers:**[19]

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial

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[15] *Supra* n14 at para 3.4.1.
[16] See s 153(5) of the CPA.
[17] See s 152 of the CPA, which provides for all criminal proceedings to be conducted in an open court.
[18] See *S v Leepile and Others(4)* 1986 (3) SA 661 (W) at 665I-J.
[19] *Richmond Newspapers Inc v Commonwealth of Virginia* 65 L Ed 973 414 (1980).

> adjudication is to achieve the objective of maintaining public confidence in the administration of justice.[20]

It is submitted that what lies at the core of this requirement of a public trial is the assurance that justice will be fairly administered in our courts. Section 153(5) of the CPA remains therefore a useful statutory tool that can be used by courts in order to afford protection to young witnesses that are afraid of, or embarrassed by, giving testimony in an open court. An application of the provision does not *per se* render the accused's trial unfair.

From the perspective of child witnesses s 153 of the CPA can, however, be criticised in that an *in camera* hearing does not follow as of right when a child has to testify. The way this section is worded makes it possible that child witnesses may have to testify in an open court. Better protection would be afforded to these witnesses had the provision compelled courts to hear matters involving child witnesses behind closed doors. A second shortcoming of the provision is that it does not provide for the removal of the parent or the guardian or the person *in loco parentis*, who sometimes may be the very cause of the fear and embarrassment of these witnesses.[21] So, despite an order by the court that a hearing should be conducted *in camera* the child may be intimidated by the presence of the parent 'assisting' him or her in court to the extent that the very purpose of an *in camera* hearing may be defeated.

6.2.2 Use of intermediaries and certain non-verbal expressions

During 1988 the Minister of Justice requested the South African Law Commission to conduct an investigation relating to the protection of children with regard to court proceedings. In its investigation the Law Commission considered a number of systems, including the system followed in Israel. It has been recognised that child witnesses experience significant difficulties in dealing with the adversarial environment of a courtroom and furthermore that they experience difficulty in fully comprehending the language of legal proceedings and the role of all the 'court

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[20] *Richmond Newspapers supra* at 1001.

participants'. Moreover, the adversarial procedure system that involves confrontation and extensive cross-examination exacerbates trauma suffered by these witnesses when testifying. For these reasons other procedures and mechanisms had to be developed to facilitate the reception of the evidence of child witnesses in criminal proceedings. From the recommendations made by the South African Law Commission in its report it appeared that, as a result of its examination of the procedures for child witnesses in the system, it considered the ordinary procedures of the criminal justice process to be inadequate to meet the needs and requirements of child witnesses.

As a result of the Law Commission's Report on the Protection of Child Witnesses, ss 1, 2 and 3 of the 1991 Criminal Law Amendment Act[22] were enacted. These amendments to the CPA came into operation on 30 July 1993 and effectively meant that children would testify *via* a live television channel, whilst being in a room separated from the courtroom. Section 170A of the CPA was therefore designed to provide protection for young witnesses by providing the assistance of an intermediary. Provision is made for the demeanour of these witnesses to be observed by means of closed-circuit television monitors.

Section 170A of the CPA provides as follows:

> (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.
> (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

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[21] See J A Robinson *The Law of Children and Young Persons in South Africa* (1997) at 179.
[22] Act 135 of 1991.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place-

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronics or other devices, that intermediary as well as that witness during his testimony.

(4)(a) The Minister may by notice in the *Gazette*[23] determine the person or the category or class of persons who are competent to be appointed as intermediaries.

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[23] The Minister of Justice has in Government Notice R1374 *Government Gazette 15024* of 30 July 1993, as amended by Government Notice R360 *Gazette 17822* of 28 February 1997, determined that the following categories or classes of persons are competent to be appointed as intermediaries:

(a) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), and against whose names the speciality paediatrics is also registered.
(b) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974, and against whose names the speciality psychiatry is also registered.
(c) Family counsellors who are appointed as such under section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and who are or were registered as social workers under section 17 of the Social Work Act, 1978 (Act No. 110 of 1978), or who are or were classified as teachers in qualification category C to G, as determined by the Department of National Education, or who are or were registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.
(d) Child care workers who have successfully completed a two-year course in child and youth care approved by the National Association of Child Care Workers and who have four years' experience in child care.
(e) Social workers who are registered as such under section 17 of the Social Work Act, 1978, and who have two years' experience in social work.
(f) Teachers who are classified in qualification category C to G, as determined by the Department of National Education, and who have four years'

> (b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance, may determine.

Although courts are authorised by law to appoint intermediaries from at least seven categories of persons, in practice intermediaries are predominantly appointed from the category of social workers. It is submitted that the appointment of psychologists would offer better assistance to child witnesses because of their specialised expertise. Experience has proven, however, that it is not always practical to acquire the services of psychologists, who are mostly in private practice, and that prosecutors therefore have to depend on social workers to act as intermediaries.

An analysis of the provision shows that the intimidation that existed in the past through severe cross-examination of the child is now tempered by the use of an intermediary. Children no longer ever have to hear any of the questions put by the defence because the intermediary relates all questions to them. The intermediary, who wears headphones, listens to the court proceedings and conveys 'the general purport of any question' to the witness.[24] In real terms it means that the intermediary will use his or her own words in questioning the child during the trial.[25] It should be noted that a court may not direct, in terms of subsection (3), that a witness shall give evidence in a separate room unless it makes an order that the witness be assisted by an intermediary in terms of subsection (1). The effect is that a witness who reasonably needs to give evidence in a separate room will also have to be examined and cross-examined through an intermediary, even though the witness may not be exposed to undue mental stress and suffering if he or she testifies without the intermediary's assistance.

> experience in teaching and who have not at any stage, for whatever reason, been suspended or dismissed from service in teaching.
> (g) Psychologists who are registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.

[24] Section 170(2)(b) of the CPA.

[25] For a discussion of the intermediary system see San Vivier 'Wynberg sexual offences court: impressions after a year in operation' 1994 *De Rebus* 569 at 570.

An examination of s 170A of the CPA shows that the provision is not limited in its application, and that it applies to all criminal proceedings. What should, however, be considered in our new constitutional order is whether cross-examination by means of intermediaries is in conflict with an accused's right to a fair trial, more specifically his right to adduce and challenge evidence.[26] In **Klink v Regional Court Magistrate NO and Others**[27] an expert witness submitted a statement to the court in support of the appointment of an intermediary. It was contended by this witness that in cases of criminal prosecutions for sexual offences the language used in court becomes an acute problem for children because 'it is overlaid by a range of emotional stresses and fears which flow from the traumatic events about which the child is called to testify'.[28] The witness was at pains to explain to the court that a young victim of sexual abuse, assault or rape experiences secondary victimisation in the form of the trial due to the following reasons:

> In the first instance the victim is required to relate *in open* court in graphic detail the particular abusive acts perpetrated upon them. This occurs in the *presence of the alleged perpetrator*. Thereafter the victim of the abuse is *subjected to intensive, and at times protracted and aggressive, cross-examination* by the accused or his legal representative. This experience *instils fear, anxiety and high levels of stress* in the witness. Under normal circumstances within court proceedings the capacity of the prosecutor or the presiding officer to intervene to curtail cross-examination and thereby to protect the witness is extremely limited. This further serves to emphasise the isolation and vulnerability of the witness in the circumstances. *Secondary victimisation* may, consequently be *as traumatic and as damaging to the emotional and psychological well-being of the victim as the original victimisation* was. It is for these reasons, in essence, that various jurisdictions, including South Africa, have introduced

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[26] See s 35(3)(i) of the Constitution.
[27] 1996 (3) BCLR 402 (SE); 1996 (1) SACR 434 (E).
[28] *Klink supra* at 410H-J.

> procedures and mechanisms to facilitate the reception of the evidence of young witnesses in proceedings involving sexual offences.[29]

Despite the challenge made to s 170A of the CPA, the Court held - in **Klink**[30] that the section does not preclude an accused from challenging the testimony of a child witness, and that the provision does not infringe an accused's right to challenge evidence in a court of law. Thus s 170A is not *per se* unconstitutional. In coming to its finding the Court equated the position of an intermediary with that of an interpreter, in as much as the intermediary interprets the testimony of the child witness without disturbing the fairness of a trial. Interpreters have fulfilled an important function in courts and have been widely used in this country.[31] Having said this, the Court looked at the offender's right to cross-examine and the possible curtailment thereof[32] and considered the dictum of Doherty JA, as stated in **Regina v Toten**[33]an appeal case before the Ontario Court of Appeal:

> The public adversarial process is, however, a means to an end – the ascertainment of truth – and has virtue only to the extent that it serves that end. Where the established process hinders the search for the truth, it should be modified unless due process or resource-based considerations preclude such modification.[34]

These remarks emphasise that any attempt to modify established rules of procedure and evidence should be done in a manner that does not deny an accused the right to have a fair trial. Considering the rationale for an exceptional procedure, such as is provided by s 170A of the CPA, it is submitted that the procedure is not aimed at violating the accused's right to challenge the testimony of the child victim. There is nothing in the provision that precludes an accused from questioning a young witness.

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[29] *Klink supra* at 410J-411C. (Emphasis added.)
[30] *Supra* n27.
[31] *Klink supra* at 411H-I.
[32] For criticism of *Klink* see discussion by Murdoch Watney 'Aspekte van getuienis aflegging deur kindergetuies deur bemiddeling van tussengangers' (1998) 61 *THRHR* 423.
[33] (1993) 16 CRR (2d) 49.
[34] *R v Toten supra* at 58.

What is precluded is the potentially harmful effect of defence counsel's forceful questions, which is blunted when an intermediary interposes between the questioner and the young witness. It is finally submitted that the impact of s 170A(2)(b) can be controlled by the court, which in turn should see to it that an intermediary does not frustrate the process of fair cross-examination.[35]

Besides the contention that s 170A of the CPA infringes the right of an accused to challenge evidence, there is the issue of the child being removed from the accused and court during the trial. This issue raises constitutional concerns due to the fact that different interests are at stake from the perspectives of the accused and the accuser. The United States Supreme Court considered such constitutional challenges in two well-known cases. In the case of **Maryland v Craig**[36] the majority of the Court held that the Sixth Amendment to the Constitution of the USA did not absolutely prohibit a procedure whereby the witness could testify in another room. The Court in **Coy v Iowa**[37]held, however, that the right of an accused to confront witnesses against him includes the right to actually, physically face the witness whilst questioning such witness.[38] In the case of **Maryland v Craig**[39] O'Connor J, in dealing with the issue, remarked as follows:

> We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.[40]

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[35] See Du Toit et al *op cit* at 22-32.
[36] 110 S Ct 31577 (1990).
[37] 101 L Ed 2d 857 (1988); 487 US 1012 (1988).
[38] See *Coy supra* at 1016 where the Court stated: 'We have never doubted that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.'
[39] *Supra* n36.
[40] *Maryland v Craig supra* at 683.

It is interesting to note that Justice O'Connor abandoned the approach followed by the court in **Coy**, to require face-to-face questioning, and opted for a much more functional approach to confrontation, in which the state was permitted to use one way closed circuit television. The functional approach adopted by the majority of the Court in **Maryland** is suggestive of a departure from the established confrontation clause jurisprudence and can be considered as an extension of the right to challenge evidence. If one compares the competing views expressed in **Maryland** and **Coy**, the **Maryland** decision is to be preferred because experience has shown that direct confrontation by the accused in a court may have the effect of diminishing the reliability of the testimony of children, which will not enhance the fairness of the criminal trial for the accused at all. Most psychologists support this view because they claim that an adversarial setting in particular discourages children from testifying truthfully.

In the United Kingdom, it seems that the procedure to admit testimony from outside the courtroom in the case of young children was sparked off by a Report by Judge Pigot QC in 1987 which stated the following:

> In other parts of the world where the quality of justice is not inferior to our own, listening to what very small children have to say and providing the suitable means for children to describe their experience outside the public arena of the courtroom is not regarded as unusual, unreasonable, or a threat to the principle that the prosecution must discharge the burden of proof.[41]

An examination of the procedural requirements set by s 170A of the CPA demonstrates that our courts have interpreted s 170A as providing for the appointment of an intermediary only after an application is lodged by the state. The appointment will not follow *mero motu,* but must be supported by evidence that the witness will suffer undue harm or stress by testifying in an open court or by being confronted by

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[41] Para 5.13 of the *Report of the Advisory Group on Video Evidence* (1989) hereinafter referred to as the Pigot Report.

the accused.[42] Youthfulness alone is not sufficient to warrant the use of an intermediary.[43] Scholars, like Pretorius, are supportive of the view that the wording of

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[42] Cf. *S v Stefaans* 1999 (1) SACR 182 (C). The Court considered it apt to proffer guidelines for the invocation of the provision. The following were laid down as guidelines at 187i-188j:

> 1. A court faced with an application for the provisions of s 170A to be invoked should be mindful of the dangers which are inherent in the use of an intermediary which might prejudice the right of the accused to a fair trial. These are:
>
> 1.1 that cross-examination through an intermediary may be less effective than direct cross-examination of a witness (Klink's case *supra*, at 409F-410B (BCL report); 441i-422e in SACR);
>
> 1.2 that an accused *prima facie* has the right to confront his accusers and be confronted by them;
>
> 1.3 that human experience shows that it is easier to lie about someone behind his back than to do so to his face.
>
> 2. The provisions of the section will find application more readily in cases involving a physical or mental trauma or insult to the witness than in other types of cases.
>
> 3. The giving of evidence in court is inevitably a stressful experience. In order to find application, the section requires the court to be satisfied that such stress will be 'undue' i.e. something in excess of the ordinary stresses. In this regard, it seems fair to say that the younger (and more emotionally immature) the witness, the greater the likelihood that such stress will be 'undue'.
>
> 4. A witness who is known to the accused and who knows the accused and is still prepared to testify is less likely to be unduly stressed by the need to testify before the accused than one who is unknown to the accused and may fear intimidation. This factor, of course, needs to be balanced by the factor referred to in para 3 above.
>
> 5. If the application to involve the section is not opposed, it may be more readily granted.
>
> 6. An unrepresented accused should have his right to oppose the application carefully explained to him by the presiding judicial officer, and, as is in the case of a plea of guilty, if any doubt exists as to the accused's understanding of the matter the application should be treated as opposed.
>
> 7. If the application is opposed, the presiding judicial officer should require that appropriate evidence be adduced to enable him to exercise a proper discretion as to whether the section should be invoked or not. Such evidence may, in the case of a younger witness in a matter clearly involving mental or physical trauma, consist of nothing more than evidence of the nature of the charge and the age of the witness. In other matters, evidence of a suitably qualified expert, whether that be a social worker, psychologist or psychiatrist may be necessary.
>
> 8. If the section is invoked the presiding judicial officer should be aware of the risk that the efficacy of cross-examination may be reduced by the intervention of the intermediary. The judicial officer should be alerted to this and should be

s 170A of the CPA qualifies mental stress as sufficient to invoke the use of an intermediary.[44] Moreover an accused should have the opportunity to address the court when it is deciding upon the appointment of an intermediary.[45]

In cases of witnesses under the age of eighteen years, the 1991 Criminal Law Amendment Act[46] further provides that demonstrations, gestures and a nod of the head shall be deemed to be *viva voce* evidence. In this regard the use of anatomical dolls proved to be useful in adducing the evidence of these witnesses. These dolls are 'male' and 'female' dolls and are made to reflect the sexual organs with accurate detail. These dolls are mostly used during pre-trial interviews to assist those children that are often too traumatised to tell what has happened. By using these dolls they can act out the events that they have experienced. Some scholars submit that such play allows a pre-verbal or traumatised child to communicate with less stress.[47]

6.3 Evidentiary rules and child witnesses

What follows is a discussion of the rule relating to children's competency and the infamous cautionary rule[48] that finds application in our law in evaluating the testimony of children.

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prepared to intervene to insist that the exact question rather than the import thereof, be conveyed to the witness.

[43] See *S v Mathebula* 1996 (2) SACR 231 (T) at 234c-f. The Court relied in particular on the view expressed by Kriegler in *Hiemstra: Suid-Afrikaanse Strafproses* at 433:

> Jeugdigheid as sodanig is nie voldoende nie. Die hof sal hom deur 'n verskeidenheid faktore laat lei, byvoorbeeld die intelligensie, ouderdom, geslag en persoonlikheid van die getuie, die aard van die getuienis en dies meer. Dit sal, ooreenkomstig gevestigde beginsels, nodig wees om die partye te ken voordat 'n besluit geneem word.

[44] See J P Pretorius *op cit* at 348.

[45] *Mathebula supra* at 234d.

[46] Act 135 of 1991.

[47] See J R Christiansen 'The Testimony of Child Witnesses: Fact, Fantasy, and the influence of pretrial interviews' (1987) 62 *Washington LR* 711.

6.3.1 Competency of child witnesses

Throughout this study it has been emphasised that, without the participation of all witnesses, the criminal justice system will come to a halt and there will be no justice. It is therefore important that courts hear the testimony of all people, including children, that can offer their testimony in solving the case. It is fundamental and in the interests of justice that child witnesses should not unnecessarily be excluded as witnesses on the basis of competency. Rigid competency requirements can consequently lead to valuable evidence being lost because witnesses that are too young are prevented from testifying in court. It is submitted that the reason why courts require that witnesses testifying in court should be competent is basically to ensure that the witness is capable of giving reliable testimony. The Pigot Committee in its investigation of child witnesses labelled the requirement of competency as a requirement 'founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all'.[49]

An examination of competency tests in most Anglo-American jurisdictions shows that what these tests aim to establish is the likelihood that the child has an accurate memory of the event to be recalled and whether it is possible for the child to communicate the recalled information accurately. Courts, however, have persisted in being sceptical with regard to child witnesses' abilities to recall events accurately, notwithstanding the fact that research has rebutted such a view.[50]

An examination of the South African criminal justice system reveals that there is no universal test, which is used by the courts in determining whether a child witness is sufficiently competent to testify.[51] What is however discernible from an analysis of South Africa's competency rule, is that age is not a decisive factor in the

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[48] See discussion of the rule in chapter 5 *supra.*
[49] Pigot Report *op cit* at para 5.12.
[50] See Helen L Westcott 'The 1991 Criminal Justice Act: research on children's testimony' (1992) 16 *Adoption and Fostering* 7 at 7.
[51] Courts are obliged in terms of s 193 of the CPA to decide upon the competency of witnesses before they testify. Parties are not permitted to consent to the admission of evidence of incompetent witnesses. Cf. Schwikkard et al *op cit* at 281.

determination of the child's competency as a witness.[52] Section 164 of the CPA provides that children will be competent to testify if they can appreciate and understand the duty to speak the truth.[53] This implies that the court will have to determine on the facts[54] of each case, whether the child is sufficiently intelligent to testify and whether the child has sufficient mental capacity to testify.[55] Various tests[56] have been employed by our courts to determine whether a child is capable of giving an intelligent and truthful account of the events.[57] It is these 'tests' which have led scholars, such as Schwikkard, to believe that a presumption of incompetence[58] applies to child witnesses. Whilst her theory is problematic, because of the notion of the

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[52] See Schwikkard et al *op cit* at 281. Cf. Wigmore *op cit* at para 505, who states with reference to the common law that no rule defines any particular age as conclusive of incapacity.

[53] See s 164(1) of the CPA and s 41 of the Civil Proceedings Evidence Act 25 of 1965. Cf. Hoffmann and Zeffertt *op cit* at 375-376; Schwikkard et al *op cit* at 281; Schmidt *op cit* at 210.

[54] This means that a court will have to enquire whether a child witness understands the oath and whether the child understands what it means to speak the truth. See *Henderson v S* (1997) 1 All SA 594 (C) at 597d-g.

[55] See *Chaimowitz v Chaimovitz(1)* 1960 (4) SA 818 (K); *S v L* 1973 (1) SA 344 (C); *S v T* 1973 (3) SA 794 (A).

[56] Criteria applied are: the child's ability to narrate events in a meaningful way; the ability of the child to distinguish between right and wrong; and the ability of the child to recollect the events. Cf. Hoffmann and Zeffertt *op cit* at 376.

[57] See *Woji v Sanlam Insurance Co Ltd.* 1981 (1) SA 1020 (A). More specifically the Court defined the terms of the competency enquiry regarding the child's competency as follows:

> The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (*Wigmore on Evidence* vol II para 506 at 596).
>
> (At 1028 B-D)

Cf. *S v V* 1998 (2) SACR 651 (C) at 652e-f where the Court held that the capacity to understand the difference between truth and falsehood is a prerequisite for the oath, affirmation and an admonition in terms of s 164 of the CPA.

[58] See P J Schwikkard 'The abused child: A few rules of evidence considered' 1996 *Acta Juridica* at 149.

presumption on which it is based, it is supported on the basis that an inference can be drawn from the perspective of competency that child witnesses are in an inferior position *vis-à-vis* adult witnesses who can rely on a presumption of competency.[59]

What is disturbing about such analysis is that South African courts, in their application of the 'competency test', have regularly used illusive concepts such as truth and falsehood to determine the competency of child witnesses. It is submitted that our courts have been much too rigid and conservative in their determination of the competency of young witnesses, without due consideration of each witness's mental faculties and powers of recollection.[60] An examination of the test shows that it operates restrictively and that children of tender age are excluded from giving testimony because they cannot draw a clear distinction between the concepts of truth and falsity, despite the fact that they can give a coherent and accurate account of incidents shortly after the event happening.[61] Scholars, like John Spencer, have argued for some time that very young children should be able to give testimony in some

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[59] See discussion *supra* at 2.1.

[60] See *S v N* 1996 (2) SACR 225 (C) at 226i-227b for the following test used by the court:

> Mnr Du Toit, sal u asseblief die kind vra, dit wil sê J B vra of sy skoolgaan?- Ja.
> Watter standerd is u?- Standerd 1.
> Standerd 1. Gaan u kerk toe ook J?- Ja.
> Wat is die naam van die kerk?- Ek weet nie.
> Die dominee se naam is?- Pastoor ons sê net pastoor, dis al.
> J, ek wil net vir u vra, soos die magistraat, u is bewus mos u is in die hof nè?
> Tussenganger: Ek kan nie die vraag hoor nie, kan u net herhaal asseblief?
> Hof: Is sy bewus dat sy nou in die hof is?- Ja.
> J, wat gebeur in 'n geval waar u nou gevra is iets, deur u pa of u ma, en u nie die waarheid praat nie, wat gebeur dan daarna aan u? – Hy sal my pak gee.

After these questions were put to the witness the Court was satisfied that the witness was able to distinguish between the truth and falsehood, was a competent witness, and was given an admonition to speak the truth. Considering the questions put to the witness and the response by the witness it is evident that the questions were not sufficient to support any conclusion of competency, much less an understanding of the nature of the oath that was admonished. Cf. *S v Mashava* 1994 (1) SACR 224 (T) and *S v Seymour* 1998 (1) SACR 66 (N).

[61] See M Reddi 'The child witness in the criminal justice system: suggestions for reform' (1993) 18 *Journal for Juridical Science* 123 at 128-129.

form, otherwise all offences committed against them will be impossible to prosecute.[62]

English law has developed in a similar way to South African law in that it has depended for some time on the child's competency to give evidence. English law also distinguished between sworn and unsworn testimony of children. The 1991 Criminal Justice Act, abolished the competency requirement for child witnesses. English judges therefore no longer have to determine solely whether the child can distinguish between lies and truth; rather they have to determine whether the child witness can give a coherent and comprehensible account of the events.[63] In England the Pigot Committee considered the following reasons as cogent to abandon the 'competency' requirement applicable to the testimony of children:

> In principle it seems wrong to us that our courts should refuse to consider any relevant understandable evidence. If a child's account is available it should be heard.... Once this evidence is admitted juries will obviously weigh matters such as the demeanour of the witness, his or her maturity and understanding and the coherence and consistency of the testimony, in deciding how much reliance to place upon it....

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[62] See J Spencer 'Child Witnesses and Video-Technology: Thoughts for the Home Office' 1987 *Journal for Criminal Law* 677; 'Reforming the Competency Requirement' 1987 *New Zealand Law Journal* 147.

[63] See *R v Hampshire* [1995] 2 All ER 1019 (CA). In *Hampshire* the Court held, that:

(a) the question of competence should be dealt with at the earliest possible moment and not after the evidence has been given;
(b) it is a matter of the judge's perception of the child's understanding as demonstrated in the course of the ordinary discourse (rather than as a result of an adversarial examination and cross-examination);
(c) where there has been an application under s 32A of the 1998 Act to rely on video-recorded evidence and the interview has been properly conducted, the judge's pre-trial view of the recording should normally enable him or her to decide the issue of competence, but if in doubt the judge should conduct an investigation; and
(d) the investigation, whether or not additional to an earlier view of a video recording, should be conducted in the presence of the accused but not the jury, because the jury function is to assess the child's evidence, and its weight, if the child is ruled competent to give it.

> The present approach therefore appears to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all. It follows that we believe the competence requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced.[64]

In accordance with the recommendations of the Pigot Committee, s 33A was inserted into the Criminal Justice Act 1988.[65] What is required of judges now is to discover whether the child understands the difference between truth and lies. The test is now intelligibility rather than an understanding of the importance to tell the truth. English case law shows that what would be required of the court is to determine whether the child can communicate and give a coherent and comprehensible account of the matters in relation to their testimony.[66]

A country that requires that child witnesses appreciate the solemnity of the court situation is New Zealand. Whilst young witnesses in New Zealand no longer have to take the oath before testifying, there is still a legislative concern that they should be 'competent' witnesses in terms of knowing the importance of telling the truth and being able to do so. Regulations[67] made in terms of the Evidence Amendment Act determine that the Act will find application where the offence is of a sexual nature and

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Cf. *G v DPP* [1997] 2 All ER 755 (DC) where the court held that no expert testimony is required in order to determine whether a child is capable of giving intelligible testimony.

[64] Para 5.12 of the Pigot Report.

[65] The amendment to the Criminal Justice Act 1988 was by virtue of s 52 of the Criminal Justice Act 1991. This section reads as follows:

52(1) After s 33 of the 1988 Act there shall be inserted the following section-

Evidence given by children

33A- (1) A child's evidence in criminal proceedings shall be given unsworn.

(2) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.

(2A) A child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony. (Inserted by s 168 of the Criminal Justice and Public Order Act 1994.)

(3) In this section 'child' means a person under fourteen years of age.

[66] See *R v D* [1995] 2 All ER 1019 (CA).

the child complainant is under the age of 17 years. It also requires that the child examiner should determine competency by establishing the following: that the complainant understands the necessity to tell the truth and as such to obtain from the complainant a promise to tell the truth, where the complainant is capable of giving, and willing to give, a promise to this effect.[68]

Looking at American law it appears that the state of Washington[69] has succeeded in designing a competency test that reflects a method to determine both the reliability and communicative competency of the child. This test, which at best can be described as a five-tier-test, includes the following:

> (1) An understanding of the obligation to speak the truth on the witness stand;
> (2) The mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
> (3) A memory sufficient to retain an independent recollection of the occurrence;
> (4) The capacity to express in words his memory of the occurrence; and
> (5) The capacity to understand simple questions about it.

It is also determined by statute that persons 'who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, are not competent to testify'.[70]

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[67] See the Evidence Amendment Act (1989).
[68] See discussion of the position of child witnesses in New Zealand by M Pipe et al, 'Perceptions of the legal provisions for child witnesses in New Zealand' 1996 *New Zealand Law Journal* 18.
[69] Washington's test was first articulated in *State v Allen* 70 Wash 2d 690, 692, 424 P 2d 1021, 1022 (1967). This test is still the basis for determining competency. See *State v Hunsacker* 39 Wash App 489, 491, 693 P 2d 724 (1984); *Dependency of A.E.P.* 135 Wash 2d 208, 222, 956 P 2d 297, 305 (1998).

6.3.2 Credibility of child witnesses

It is trite law that the testimony of children must be treated with circumspection and that their evidence, if not corroborated, be accepted with great caution.[71] Some of the arguments on this issue will turn on how much credence should be given to the evidence of small children. Before one can judge the reliability of their testimony it is important to understand the unique processes of children's memory.

I consider it therefore appropriate for purposes of this discussion to begin with the definition of memory in order to understand the storing of data by a child. Memory is defined as a function of two components: the capacity to take in and retain accurately images, sounds and other elements of experience which are the raw material of memory; and the skill to recall these items and express them meaningfully to others.[72] To understand memory in the context of children it is important to note that the former is a natural attribute, whilst the latter is a learned skill. Psychologists tend to distinguish between 'semantic' memory, which is a retained verbal expression presenting an experience, and an 'episodic' memory, which is a memory of the concrete sensory detail of the actual experience.[73] It has been contended by experts like Johnson and Foley that the cognitive skill used to recall memories develops only between the ages of five and ten.[74]

The second issue to be considered is that once children have developed the skill to recall memory, how do they recall specific memories, relating to specific incidents? Researchers maintain that one method of recalling memory is by giving the child a cue that would trigger the memory that should be recalled. This then brings me back to the courtroom situation where leading questions might be used as cues to help a

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[70] See s 5.60.050(2) of the Washington Revised Code.
[71] See C W H Schmidt and D T Zeffertt *The Law of South Africa* Vol 9 *Evidence* (rev ed by D P van der Merwe) (1997) at para 156. Cf. *R v Sikurlite* 1964 (3) SA 151 (SR); *R v Manda* 1951 (3) SA (A).
[72] See M Johnson and M Foley 'Differentiating fact from fantasy: The Reliability of Children's Memory' (1984) 40 *Journal of Social Issues* 33 at 34-36.
[73] See R Brown 'The Development of Memory: Knowing, Knowing About Knowing, and Knowing How to Know' (1975) 10 *Advances in Child Development and Behaviour* 136.
[74] See M Johnson and M Foley *op cit* at 34.

child recall a memory out of his reach[75] without knowing whether the memory is a suggested memory or a true memory of the child. This problem is compounded by the fact that a cross-examiner with a preconceived idea of what has happened might wittingly and even unwittingly impose an idea on the child and suggest certain answers to the child in order to discredit the child's testimony in court.[76]

It is also possible that contamination of a child witness's memory may happen at the pre-trial stage during consultation. If the interviewer is not skilled or well trained in child psychology, he might be contaminating the child's testimony by putting certain suggestions to the child. There is therefore the risk that this contamination might falsify the child's memory of the event either in part or in whole. It will be suggested at the end of this discussion that it is in the interests of justice that trained and qualified personnel should conduct all interviews of child witnesses.

6.3.3 The hearsay rule and child witnesses

In an examination of systems used in other countries it has been noted that in a country such as Israel, hearsay testimony is used to protect the child from the courtroom trauma. The law in Israel is designed to keep children under the age of fourteen years out of court, in cases involving sexual offences.[77] Under the Israeli statute a youth examiner makes a report which is admissible in court in lieu of the child coming to court to testify. If the court or the defence wants to put other questions to the child, the youth examiner shall decide whether such questions will cause psychological harm to the child and if so may refuse to re-examine the child.[78]

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[75] See R Brown *op cit* 115; L Berliner and M K Barbieri 'The testimony of the child victim of sexual assault' (1984) 40 *Journal of Social Issues* 129.
[76] See G S Goodman and V S Helgeson 'Child Sexual Assault: Children's memory and the law' (1985) 40 *University of Miami LR* 181 at 188-191 and 195.
[77] See Israeli 'Amendment to the Law of Evidence' passed by the Knesset on 7th June 1955, called the *Law of Evidence Revision (Protection of Children)* 5715-1955. The law came into operation on 20 September 1955. See J Y Parker 'The Rights of Child Witnesses: Is the Court A Protector or Perpetrator' (1982) 17 *New England LR* 643 at 680.
[78] See J Y Parker *op cit* at 680.

The approach adopted by the Israelis is however severely criticised by McEwan[79] who considers the system as being too prejudicial towards an accused in that it denies an accused the opportunity to challenge evidence against him.[80]

The most progressive and useful piece of legislation governing hearsay testimony of children is the one drafted and created by the Washington legislature which has since served as a blueprint for a number of states in the United States of America. The Washington exception provides for evidence which is sufficiently reliable to be admitted if the child later testifies and is subjected to cross-examination.[81] It further provides that where a child is unavailable or does not testify, that corroborating evidence is needed. The corroboration requirement may be fulfilled through the adducement of other physical evidence like witnesses' statements, other independent

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[79] See Jenny McEwan 'Child Evidence: More proposals for Reform' 1988 *Crim LR* 812 at 820.

[80] McEwan maintains that the Israeli system is in contravention of art. 6.3(d) of the European Convention on Human Rights. Article 6.3(d) of the Convention provides that 'anyone charged with a criminal offence has *the right to examine witnesses* against him and to obtain some attendance and examination of witnesses on his behalf.'(Emphasis added)

[81] See s 9A.44.120 of the Revised Washington Criminal Code that provides as follows:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, or describing any attempted act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: Provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

evidence and admissions or confessions. A court that has to decide upon the reliability of a hearsay statement will look at the following factors:[82]

(1) whether there is an apparent motive to lie;
(2) the general character of the declarant;
(3) whether more than one person heard the statements;
(4) whether the statements were made spontaneously;
(5) the timing of the declaration and the relationship between the declarant and the witness;
(6) the statement contains no express assertion about past fact;
(7) cross-examination could not show the declarant's lack of knowledge;
(8) the possibility of the declarant's faulty recollection is remote, and
(9) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Legislatures in the USA have authorised the prosecution to permit the parties to play videotape recordings of statements, depositions and the preliminary hearing of the child victim, at the trial instead of tendering *viva voce* testimony of the child.[83] The importance of out of court statements is succinctly stated by the court in the case of

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[82] These factors are more commonly referred to as the 'Ryan factors'. See *State v Ryan* 103 Wash 2d 165, 175-76, 691 P 2d 197, 205 (1984).

[83] See discussion by Michael H Graham, 'Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions' (1985) 40 *University of Miami LR* at 21, particularly where he states the following:

> State legislatures have dealt with reform of the rules of evidence in two basic ways. First, legislatures have created a hearsay exception for child abuse prosecutions that makes out of court statements of the victim admissible under certain prescribed circumstances. Second, legislatures have authorized the prosecution to permit the parties to play videotaped recordings of statements, depositions, or preliminary hearing testimony of the child victim at trial instead of eliciting viva voce testimony. They also have authorized the child witness to testify at trial over closed circuit television or in a special designed children's courtroom. The purpose of such reforms is to allow the child to testify without having to come face to face with the accused in open court Both types of reforms have many variations.

State v Myatt:[84]

> Often the child victim's out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other that the victim and perpetrator are rare as people simply do not molest children in front of others.... Most often the offender is a relative or close acquaintance who has the opportunity to be alone with the child.... Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive.... *The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant.* Therefore, these hearsay statements are usually necessary to the proceedings as the only probative evidence available.[85]

The state of Kansas has also enacted a hearsay exception, which finds application only when the child is unavailable and once a specific finding has been made regarding the child's trustworthiness.[86]

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[84] 237 Kan 17, 697 P 2d 836 (1985).

[85] *Ibid.* (Emphasis added.)

[86] Kansas Stat Ann s 60.460(dd) provides as follows:

> Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
> (dd) *Actions involving children.* In a criminal proceeding or a proceeding pursuant to the Kansas juvenile justice code or in a proceeding to determine if a child is a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that a child is a juvenile offender or a child in need of care, if:
>
> (1) The child is alleged to be a victim of the crime or offense or a child in need of care; and
> (2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.
>
> If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or

It is submitted that in South Africa legislative reform is required as a matter of necessity to create a special exception to the hearsay rule that will provide for the testimony of child witnesses out of court. This proposal may be seen as a drastic provision and one that runs counter to the right of the accused to challenge evidence in court.[87] However, the rights of child victims are so important in any open and democratic society based on human dignity, equality and freedom that it should be possible to invoke the limitation clause[88] of the Constitution with success. The formulation of such a special exception to the general rule against hearsay should, however, be narrowly drafted, taking full recognition of the risks of hearsay testimony.

Such reform is required despite the provisions of s 3 of the Evidence Amendment Act 45 of 1988.[89] Experience has shown that our courts interpret this provision too

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promises that might have been made to the child to obtain the statement and any other relevant factor.

[87] See s 35(3)(i) of the Constitution.

[88] See s 36 of the Constitution.

[89] See s 3 of Act 45 of 1988 provides as follows:

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to-
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)
(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such

restrictively, thus making it impossible to use as an exception in instances of child abuse and neglect.[90]

An esteemed academic such as John Spencer[91] has criticised the hearsay rule as silly, 'needlessly complicated' and 'a disaster for justice in cases where children are concerned'. According to him the rule is responsible for the prevention of the best available evidence being presented to the court.[92]

6.4 Focus on special offences committed against children

Whilst this thesis is not a study of the substantive law it once more requires an analysis of one of two specific offences which are inherently committed against children. Cases of incest[93] have a special dimension to them in that they are committed by those people who are in a position of trust in relation to the children. In most cases the offender has a strong bond with the child. Oates argues that children who are victims of incest have to deal with a variety of psychological factors if they have to incriminate their parent in court. It is suggested that one of their biggest fears is that the parent will always hold it against them for speaking out.[94]

Without denying the trauma caused by any violent abuse of a parent towards a child I want to submit that the trauma caused by incest is more severe and harmful than the physical violence directed at the child. Using one's child for sexual gratification must be the worst distortions of parenthood and betrayal of trust that can exist.

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proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

[90] For an interpretation by the South African courts of the provision see *S v Mpofu* 1993 (2) SACR 109 (N); *Hewan v Kourie* 1993 (3) SA 233 (T); *Mnyama v Gxalaba* 1990 (1) SA 650 (C).

[91] See generally J R Spencer and R Flin *The Evidence of Children – The Law and Psychology* 2 ed (1993).

[92] *Op cit* at 159-160.

[93] Incest is defined in our law as unlawful and intentional sexual intercourse between two persons who on account of consanguinity, affinity or adoptive relationship may not marry one another. See Burchell and Milton *op cit* at 532 and Snyman *op cit* at 335-336.

Presently our law is not aimed specifically at the protection of the child witnesses and they have to depend on the courts either to detain the offenders or to set special bail conditions. The other possibility is an application for an interdict under the Prevention of Family Violence Act,[95] in terms of which the offender may be restricted or even prohibited from entering the aggrieved family member's home. Neither of these options is aimed at children specifically. In cases of severe abuse, however, the child may be protected by a protection order of the court, which then places the child under the care of the Department of Welfare.[96] However, such order may not be in the interest of the child in that he or she may perceive this 'placement' away from their family and friends as punishment for the complaint.

A much better system of dealing with these offences is the more innovative method proposed by Dr Giaretto.[97] The aim of this programme, which is used in California and other American states is to stop the offence from continuing in the future and to stop the 'addiction' of the offender. The programme provides for a speedy process, as opposed to a slow process offered by the prosecution of the offence in court. Rapid pre-trial diversion of the offender into a reparative programme is designed to remove the offender from home and to stop the ongoing abuse. The offender is ordered to stay in the programme and to face what he has done in the company of other incest offenders. While he is being treated the child and mother are also rehabilitated. Statistical measures suggest that the programme is highly successful; the pre-trial diversions in cases of father and daughter incest, have resulted in a 90% rate for confessions and the programme is now used in 150 child abuse centres.[98]

It is submitted that this programme should be considered as a possible solution to alleviate the trauma suffered by child abuse and incest victims. It is supported for the following reasons: it spares the child the ordeal of a court case; it gives the child

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[94] See R K Oates *op cit* at 132.
[95] Section 2 of the Prevention of Family Violence Act 133 of 1993.
[96] See s 15 of the Child Care Act 74 of 1983.
[97] See H Giaretto *Integrated Treatment of Child Sexual Abuse: A Treatment and Training Manual* (1982).
[98] See Desmond Gurry 'Child sexual abuse' (1991) 154 *Medical Journal of Australia* 9 at 11.

immediate protection without the shame and trauma of having a parent in gaol; and, finally it addresses the offensive behaviour that caused the abuse in the first instance.

6.5 Special courts

In chapter 5 I have discussed the Wynberg Sexual Offences Court,[99] which not only deals with the testimony of rape victims but which also serves as a special court to hear cases of child sexual abuse. Shortly after the inception of the Wynberg Sexual Offences Court another special court was opened in Cape Town, with the difference that the Cape Town court was initiated to deal exclusively with the testimony of young children. The court is referred to as Court 32. In most respects the Cape Town court matches the Wynberg Court except that the facilities available to this court are not as spacious as those at Wynberg. The court is run in the same manner as Wynberg and staffed by specially trained prosecutors. Both courts aim at making the court experience an unintimidating and more comfortable experience for children by familiarising them with court procedures and by taking care of the special needs of these children.

Perhaps one of the most distressing things to know about children that have to appear in court as witnesses is that not all the courts have special facilities to accommodate these witnesses, be that a special screen to use in court or any television facility to hear the testimony of these young witnesses. So despite the advantages that procedures like s 170A of the CPA may have to offer young witnesses, not all of these witnesses will benefit from these procedures, because of insufficient facilities. An even more disturbing feature is that most courts do not even have a Victim Support Services Co-ordinator to assist child witnesses and to refer them for counselling or treatment.[100]

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[99] See 5.3 *supra*.

[100] Ms Shifra Jacobson, director of Resources Aimed at the Prevention of Child Abuse and Neglect (Rapcan) supports the idea of more courts with facilities for child witnesses. She maintains in a recent article that if the Department of Justice wants to improve the system for child witnesses then special courts should be put in all areas of the Peninsula and throughout the country. See 'Putting the law on the side of the victim' *The Cape Argus* 14th April 1997 at 14.

6.6 Possibilities for reform

In the course of this chapter it has been argued that much of the trauma that children have to endure by testifying in court can be attributed to the fact that they have to submit themselves to being cross-examined by the defence. Most practitioners will agree that cross-examination is a powerful weapon in the hands of each opposing party and that most witnesses testifying in court fear it. Children are no exception. This brings me to the question of whether an inquisitorial system would not accommodate child witnesses more effectively.[101] An inquisitorial system has the advantage that it would deal with their testimony in a less confrontational manner. An examination of all the existing procedures applicable to child witnesses' testimony should entail a thorough investigation into all different methods of trial, including the methods primarily associated with an inquisitorial trial process.

Something else that should be considered as a matter of urgency is the effect of delays on children. Whilst most witnesses are affected by the delay of a trial, children, because of their vulnerability, are affected particularly severely by these delays. Delays in the disposal of criminal trials that involve child witnesses contribute to the stress that these witnesses have to experience.[102] Common sense dictates, and psychiatrists confirm, that 'rehabilitation' of a traumatised child can only become successful once the child is able to face up to the horrible and traumatic event that has happened, and be in a position to come to terms with the trauma experienced. Dr Key illustrates the distressing effect of inordinate delays on child witnesses.[103] Her criticism of the system is based on a sexual abuse case that extended over two years. She found that this process of delay was a 'developmental disaster' for the child concerned, as it would be for any child. It is therefore submitted that if the criminal justice system requires the testimony of young witnesses, then the emotional trauma suffered due to delays of the trial should be considered as a factor impacting on these witnesses and a time limit should be considered for the conclusion of these trials. This

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[101] Jenny McEwan *op cit* at 821 supports an inquisitorial system as opposed to a system of a lay intermediary and video recorded testimony.
[102] Spencer et al *op cit* at 81.
[103] See J J A Key 'The child witness: the battle for justice' 1988 *De Rebus* 54 at 55.

proposal is not farfetched, other jurisdictions, like Scotland, have a 110-day rule in dealing with child abuse cases.

Whilst it has been argued generally above that more witnesses should be shielded from harsh cross-examination it is now suggested that such protection could be achieved by an amendment to s 170A of the CPA. It is proposed that s 170A(1) of the CPA be amended to offer protection to all witnesses by the mere deletion of the words 'under the age of eighteen years'.[104] Such an amendment will not only benefit severely traumatised victims,[105] but will also be to the advantage of those witnesses who do not have the same mental capacity as adults. Witnesses who have the mental capacity of children under the age of eighteen are currently excluded from the use of the intermediary system and are thus exposed to the ordinary procedures that exist for all witnesses. It is submitted that such an amendment would not necessarily impact on the fairness of the trial, because in each case the court will exercise its discretion

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[104] Such an amendment to s 170A could be drafted as follows:

> s 170A (1) Whenever criminal proceedings are pending before any court and it appears to such court that it *would expose any witness to undue mental stress or suffering* if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.(Empahsis added)

[105] I consider it to be fitting to refer to two cases that caused a lot of dissatisfaction amongst some prosecutors at this Special Court in time that I served as Senior Public Prosecutor at Wynberg. In the first matter, *S v F* Case No SHG 130/94, the accused was charged with rape. The complainant a 24 year old woman was raped by him over a period of five years. The offence took place about thirteen years earlier when the complainant was still a child. She was so traumatised by the experience that she had to undergo psychological treatment for a period of twelve months before she could testify. She seemed visibly disturbed by the presence of the accused and although the offences were committed when she was still a young child she was naturally precluded from using an intermediary in the presentation of her testimony. The complainant's mental stress was exacerbated by testimony in court, that she at times started vomiting and could only manage the trial with support from her counsellor and sympathetic guidance from the specialised prosecutors. This case is a prime example of victimisation through the court process and is something that could be avoided should any changes to s 170A be considered. The second case, *S v R* Case No SHG 259/94, has facts similar to the previous case discussed except that in this case the complainant was 29 years old and the offence was committed at a time when she was already an adult. Once again she suffered severe anxiety by testifying in the presence of the accused. If she could have testified in another room through an intermediary, the quality of her testimony would have been much better.

based on facts that will support the conclusion that the witness will suffer unduly if an intermediary is not appointed.

A guaranteed way of improving the system and reducing the stress for child witnesses would be to provide for technical assistance in the questioning process of children. This should include special training of the police officers questioning the children and the prosecution personnel prosecuting these cases. People undertaking the prosecution of these sensitive cases should also receive some training in developmental and child psychology.

6.7 Conclusion

It is conceded that the proposals made in this chapter might not solve all the problems of these young victims. However some, like the suggestion to use an out of court statement for children, do have the potential to make the court experience a less daunting one and will be an improvement on the system currently used by the courts. Legislative intervention will not be effective unless there is a change in the views of the judiciary. Judges, magistrates and lawyers need to be better informed of recent developments in psycho-legal research that has disproved many of the traditional notions that existed over the years regarding the unreliability of child witnesses.[106] Training is required as a matter of necessity.

It should be borne in mind that the issues surrounding child witnesses discussed in this chapter cut across many areas of law and raise complex questions that can be addressed only in collaboration with other sciences like the social and behavioural sciences. This makes it almost impossible to offer quick fix solutions to deal with the difficult procedural issues that arise in cases involving child abuse and child neglect.

What is evident is that adequate resources must be made available to provide sufficiently trained and specialised personnel for the criminal justice system. Rushing to legislative solutions without due examination of the problem may in the end do

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[106] See A E Tobey and G S Goodman 'Children's eyewitness memory: Effects of participation and forensic context' (1992) 16 *Child Abuse and Neglect* 779.

more harm than good. What is needed are more reliable studies about children's experiences in the criminal justice system, in order to identify more closely the causes of system trauma and to formulate viable solutions. A criminal justice system that does not accommodate a class of victims, especially those who are so vulnerable and helpless and deserving of protection, like children, does not serve society well.

Chapter 7

7. The Sentencing Process and Victims

7.1 Introduction

> **The *forgotten man is the victim of an offence*, who, if still alive, is always good enough to attend the trial and give evidence for the State. He is often subjected to such gruelling cross-examination at the hands of the defence that he begins to wonder whether he is not the one who has done wrong. Ultimately sentence is passed and he is forgotten. *He derives small satisfaction from the imprisonment imposed on the accused,* and he wonders why the State should be enriched by a fine for *a loss he has suffered.*[1]**

Words uttered in 1973, but words that will still hold true of sentencing in South Africa in 1999. The position of the victim as an integral part of the sentencing process has not improved over the past twenty-six years. Unlike the offender the victim does not have special status or rights at the sentencing phase, even though this stage has the potential to give true recognition to victims of crime and to restore justice.

A focus on the South African sentencing process[2] will show that presiding officers are concerned with factors such as the personal circumstances of an offender, the nature of

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[1] Hiemstra J's paper on 'Compensation for the Victims of Crime' read at the *National Criminological Symposium on Crime Prevention* held at the University of South Africa in Pretoria, 28-31 August 1973, as quoted by the Viljoen Commission in its *Report on The Penal System of the Republic of South Africa* RP 78/1976 para 5.1.6.3.2. (Emphasis added.)

[2] The sentencing phase is considered to be the phase after the determination of criminal liability and is characterised by Ashworth as a public, judicial assessment of the degree to which the offender may rightly be ordered to suffer legal punishment. See A J Ashworth 'Criminal justice and deserved sentences' (1989) 36 *Criminal LR* 340.

the crime that has been committed and the interests of society at large in proposing sentence.[3] Victims it seems are still nothing more than mere witnesses with limited rights to restitution in respect of losses or damage caused by the offender.

It should be acknowledged that sentencing relates to a broad field, including the study of penology and criminology. This discussion will not consider sentencing in its broader context. It will focus primarily on the procedural processes affecting victims of crime. It is inevitable that certain basic principles of sentencing like retribution, deterrence, prevention and, to a lesser extent, rehabilitation will be referred to but this will be done with the focus on victims and not offenders.

The South African sentencing process will be criticised on the basis that it does not sufficiently focus on the issue of the harm[4] suffered by victims, either directly or indirectly, as a result of a crime having been committed. It could, of course, be argued that our courts do give recognition to the rights of victims, albeit indirectly, by considering the interests of the community as a factor in the sentencing process. I would, however, submit that such recognition is not sufficient if one considers the direct consequences caused by an offence. There is a specific relation between the harm suffered and the victim, which makes it a moral imperative to recognise the injustices suffered by victims. These injustices are equally a legal imperative and warrant recognition in the system. It will be argued in this chapter that one method that confers such legal recognition of the rights of victims is a sentence which includes a compensation order in favour of the victim. Another way of giving recognition to victims at the sentencing phase, is to give these victims the legal right to be heard before sentence is passed. At present, submissions before sentence are made in terms of s 274 of the CPA.[5] Under our current law victims do not have the same right as the accused and the

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[3] See generally D Van Zyl Smit 'Sentencing and Punishment' chap 28 in Chaskalson et al (eds) *Constitutional Law of South Africa* (1996).

[4] It is envisaged that the following could be considered as harm; bodily injuries; loss of property; damage to property; loss of income; psychological and emotional trauma suffered.

[5] The section provides as follows:

prosecution. Section 274 of the CPA was never aimed at victims, specifically; it gives the prosecution the right to address the court on sentence. Prosecutors have many functions to fulfil in court, one of which is to place all the facts before the court before sentence, and not only those facts in relation to aggravation of sentence.[6] They are therefore not well suited to fulfil the function of victims' advocates because they have the dual responsibility to place all factors before the court including those factors in mitigation known to them, in the interest of justice. It is this dual responsibility that makes it difficult to focus on the rights of victims. For this reason the process as presently designed fails victims of crime dismally. Victims should rather be afforded the opportunity to act in their own interest by making statements to the court. It is submitted that such victim impact statements could improve the current position of victims at the sentencing stage.

The adoption of such a concept could be achieved through legislative measures, which could be fashioned along the lines of models adopted in New Zealand and the United States of America. It is submitted that a coherent body of law on victims' rights[7] is needed to provide special protection for victims. Without such a body of law victims will remain second class citizens of the criminal justice system.

7.2 The South African situation

Sentencing is difficult and complex. The difficulties are often exacerbated by the absence of standards or guidelines on how to punish offenders.[8] It is therefore no easy task to

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274(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

[6] See Kriegler *op cit* at 657. Cf. *R v Motehen* 1949 (2) SA 547 (A).

[7] This submission is based on the premise that the term 'right' is understood to mean an enforceable remedy or entitlement to obtain a specific result.

[8] See *S v Rees* 1984 (1) SA 468 (W) at 470B-C, where Goldstone J regarded the task of any presiding officer in imposing an appropriate sentence as being difficult:

determine the objectives of the courts in passing sentence. The traditional purpose of sentencing is captured by Rumpff CJ in the following words:

> .... it must be accepted as a fundamental principle that contemporary society sees the treatment of a criminal not only in the light of reform of the person himself and the protection of society, but also in the light of retribution. We are of the opinion that society accepts the following as inherent in punishment: (1) Protection of society; (2) deterrence of others; (3) deterrence of the person punished from repetition of his conduct; (4) reform of the criminal; and (5) retribution.[9]

South African courts, despite not having specific sentencing guidelines, have formulated a near uniform approach to be followed by sentencing officers. The following three factors must be taken into account, as was stated by Rumpff JA in **S v Zinn:**[10]

> What has to be considered is the triad consisting of the crime, the offender and the interests of society.[11]

The approach set out by Rumpff JA has been recognised as stating the basic sentencing principles that must be considered in determining an appropriate sentence.[12] In addition

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> So much by way of an introduction to what is always a painfully difficult problem, finding a proper and just sentence. The major cause of this difficulty is that the Court, in determining a sentence, must perforce attempt to reconcile interests which are often not reconcilable and which are indeed in opposition. The interests of society in relation to punishment are frequently in opposition to the interests of the offender and a proper punishment for a particular type of offence may run counter to both of the aforementioned interests.

[9] See para 1.22 of the Rumpff Report of *The Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* RP 69/1967.

[10] 1969 (2) SA 537 (A).

[11] *S v Zinn supra* at 540G.

[12] These principles have been confirmed in a number of Appellate Division decisions. See *S v Roux* 1975 (3) SA 190 (A); *S v Sparks* 1972 (2) SA 396 (A); *S v Holder* 1979 (2) SA 70 (A) and *S v Scheepers* 1977 (2) SA 155 (A).

to these basic principles due regard must be paid to the aims[13] of punishment as enunciated in **S v Rabie:**[14]

> Punishment should fit the criminal as well as the crime, *be fair to society*, and be blended with a measure of *mercy* according to the circumstances.[15]

Our courts have also emphasised over the years that cases are unique and that there could therefore be some justifiable disparity in the sentences imposed. The uniqueness of each offence, despite being classified as one and the same offence, is succinctly stated by Kriegler J in **S v D**[16] in the following words:

> Die vakliteratuur, wat die regsgeleerde slegs deur 'n spieël en 'n raaisel sien, wil dan ook daarop dui dat daar in 'n geval soos die onderhawige breër gekyk moet word as bloot die pleger van die wandaad. Seksuele peutering met kinders binne gesinsverband is meermale 'n manifestasie van gesinspatologie. *Om die pleger se handelinge, sy blaamwaardigheid en sy geregtelike lot te bepaal, verg dan nie alleen 'n ondersoek van die beskuldigde nie maar ook van die gesin.* Bowendien is een van die geykte rigsnoere by vonnisoplegging die belange van die gemeenskap (kyk *S v Zinn* 1969 (2) SA 537 (A) op 540G - H) en in 'n geval soos die huidige staan die gesin in die voorste ry van belanghebbendes. Ook om daardie rede moet daar dan gelet word op die gesin, sy samestelling en dinamiek.

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[13] In *S v Khumalo* 1984 (3) SA 327 (A) at 330D-E, the Court held:

> In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment mentioned by Davis AJA in *R v Swanepoel* 1945 AD 444 at 455, namely deterrent, preventive, reformative and retributive (see *S v Whitehead* 1970 (4) SA 424 (A) at 436E-F; *S v Rabie* 1975 (4) SA 855 (A) at 862).

These aims have also been stated in *S v Mathee* 1971 (3) SA 433 (A). *S v Petrus* 1969 (4) SA 85 (A) at 91E-F; *S v Narker and Another* 1975 (1) SA 583 (AD) at 586D.

[14] 1975 (4) SA 855 (A). Cf. *S v Di Blasi* 1996 (1) SACR 1 (A); *R v Karg* 1961 (1) SA 231 (A).

[15] *S v Rabie supra* at 862G-H.(Emphasis added)

[16] 1989 (4) SA 709 (T).

Die *rehabilitasie van die beskuldigde en, moontlik nog belangriker, dié van die betrokke kinders,* mag dit noodsaak. Daar kan ook nouliks besin word oor die vooruitsigte op rehabilitasie sonder sodanige inligting. Dit is haas oorbodig om by te voeg dat 'n regsgeleerde hom by sodanige ondersoeke sal laat lei deur toepaslik gekwalifiseerde vakkundiges. *Dit mag ook blyk dat deskundiges op meerdere terreine geraadpleeg moet word.* Ook daaroor sal die regsgeleerde hom deur deskundiges laat lei. Dit staan die landdros natuurlik vry om die deskundige(s) pertinent te versoek om bepaalde aspekte wat by vonnisbepaling ter sake sal wees, na te gaan en daaroor verslag te doen. In laasgenoemde verband is dit wenslik om te illustreer wat bedoel word. In die eerste instansie moet die beskuldigde deeglik betrag word. In para 1 van die landdros se memorandum, hierbo, word die beskuldigde beskryf as ' 'n welopgevoede man' wie se intelligensie 'na die hof se mening heeltemal normaal' is en by wie ná 'deurtastende waarneming' 'geen afwykings' te bespeur was 'wat verdag' voorkom nie. 'n Mens se sogenaamde opvoedingspeil is moeilik bepaalbaar en bowendien 'n subjektiewe oordeel. Sy intelligensie is nog moeiliker om te bepaal, selfs in 'n kliniese atmosfeer. Die 'bespeuring' van 'verdagte afwykings' val nog minder binne die kennisveld van die gemiddelde regterlike beampte. Waar die landdros dan in para 4 van die memorandum verdere psigologiese menings uiter aangaande die beskuldigde, is dit eweneens 'n oorskryding van sy bevoegdheidsveld. Vanselfsprekend is 'n ervare regterlike beampte bevoeg om sekere breë indrukke aangaande 'n beskuldigde of 'n getuie te vorm. Mensekennis is immers 'n onmisbare komponent van 'n regterlike beampte se mondering maar dit veroorloof hom nie om sosiologiese, psigometriese en psigologiese opinies te vorm - en daarop te handel - sonder vakkundige bystand nie. Te meer is dit die geval waar daar te make is met 'n komplekse verskynsel soos die onderhawige. *Feitelike inligting en 'n vakkundige opinie oor die aard en wese van die mens voor die hof moet ingewin word.* Dit blyk nie eers of hy vantevore met die gereg gebots het

vanweë dergelike optrede nie. Niks is bekend oor die spesifieke omstandighede waarin die wandade hul oorsprong gehad het nie. Daar is niks bekend oor die frekwensie waarmee die voorvalle plaasgevind het nie. Daar is niks bekend aangaande die beskuldigde se belewing van sy afwykende gedrag nie. Nietemin word bevind dat hy nie omgee wat sielkundig met die kinders gebeur nie, dat hy ander kinders op straat kan molesteer, dat gevangesetting vir hom as afskrikking sal dien, dat dit die enigste gepaste boetedoening vir sy dade sal wees en dat hy in die gevangenis 'deeglike behandeling' gegee sal word. Daar is in die karige gegewens weinig, indien enigiets, om enigeen van die gemelde opmerkings van die landdros te rugsteun. *Vakkundige bystand dienaangaande is noodsaaklik.* Dit is ook nodig as die klaagsters, hul belange en die samelewing se belang by hulle na behore beoordeel moet word. Die landdros 'beskou hierdie as een van die afskuwelikste misdade wat ooit kan bestaan' (memorandum para 2, tweede paragraaf). Vervolgens beskryf hy die 'pyn, lyding en sielewroeging' van die klaagsters en veroorloof hom dan 'n sielkundige diagnose en 'n langtermyn prognose. Ongelukkig staan geeneen van die stellings op pote nie. Die seksuele mishandeling van kinders is ongetwyfeld hedendaags 'n cause célèbre maar dit betaam 'n regterlike beampte om sy ewewig te behou. Geslagsverkeer tussen volwassenes en kinders is ongetwyfeld verwerplik in die oë van Blanke Suid-Afrikaners van vandag maar dit was nie altyd nie en is bepaald nie nou universeel die beskouïng van regdenkendes nie. Daar is gesaghebbende navorsing wat daarop dui dat die verskynsel by die antieke Grieke en Romeine en vandag in diverse kultuurgemeenskappe teenwoordig was en is. .... Bowendien, en selfs volgens Suid-Afrikaanse hedendaagse norme, kan die landdros se hoogs emosionele beskrywing van die misdaad nie ondersteun word nie. Iedere geval moet op sy eie

> meriete beoordeel word sonder om dit *a priori* 'n plakkaat om die nek te hang.[17]

Since the early 1990's and the enactment of new legislation based on community correctional alternatives to imprisonment, the emphasis of sentencing has, however, moved from retribution to correction.[18] What is, however, more important is to look at the approach of the courts since the adoption of the Constitution to see whether the aims of sentencing are still the same and to examine the effect, if any, of the Constitution in recognising the rights of victims. The effect of the Constitution can at best be determined be examining the decisions of the Constitutional Court.

In **S v Williams and Others**[19] Justice Langa stated the following with regard to the aims of punishment and sentencing:

> There has been a shift of emphasis with regard to the overall aims of punishment. There is a general acceptance, as observed by Schreiner JA in **R v Karg**, that the retributive aspect has tended to give way to the aspects of prevention and correction. New and innovative systems and procedures have been introduced and some of them has been incorporated into legislation. The traditional objectives of punishment, namely prevention,

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[17] *S v D supra* at 714G-716A.(Emphasis added)

[18] See *S v R* 1993 (1) SA 476 (A) at 487E-F:

> Ons straftoemeting het egter nou 'n heel nuwe fase betree. Korrektiewe toesig is weliswaar as nog 'n onbeproefde vonnisopsie maar dit blyk reeds uit die magtigende wetgewing dat dit groot potensiaal inhou. Wat veral tref, is die veelsoortigheid daarvan. By nadere ondersoek word dit duidelik dat die benaming 'korrektiewe toesig' nie soseeer 'n vonnis beskryf nie maar 'n versamelnaam is vir 'n wye verskeidenheid maatreëls waarvan die enkele gemeenskaplike kenmerk is dat hulle buite die gevangenis toegepas word. Die ingrypende aard van die Wysigingswet is opvallend by die blote aanskoue van die aanhef – dit beslaan meer as 'n bladsy. Die belangrikste aspek daarvan is die klemverskuiwing vanaf gevangenisstraf na hervorming.

[19] 1995 (3) SA 632 (CC).

> retribution, deterrence and rehabilitation, are no doubt still applicable. Still applicable, albeit in modified form, are the remarks of Holmes JA that:
> 'Punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy....
> The element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked, lest the Court be in danger of reducing itself to the plane of the criminal....'
> While those principles have remained eternal truths with regard to the purposes of punishment, the justice and penal systems have been evolving towards a more enlightened and human implementation of those principles. In keeping with international trends, there has been a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.[20]

It is clear from this quotation that there is doubt as to whether retribution will carry the same weight as the other punishment objectives. This move away from retribution is continued by the court in the landmark decision of **S v Makwanyane and Another**.[21] The court in **Makwanyane** when grappling with the death penalty as a form of punishment, voiced the following opinion:

> *Retribution is one of the objects of punishment, but it carries less weight than deterrence.* The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of 'an eye for an eye, and a tooth for a tooth'.

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[20] *S v Williams supra* at paras 65 and 66.
[21] 1995 (3) SA 391 (CC).

> Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it.[22]

This review of the approaches followed by the South African courts over the past years demonstrates cogently that no special regard has been paid to victims and the harm that they have suffered. This untenable situation in the system should no longer be tolerated, especially in the light of the fact that South Africa has become a signatory to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse.[23] The following principles of this Declaration are related to sentencing and the sentencing process:

- Victims should be treated with compassion and respect for their dignity and are entitled to prompt redress for harm caused.
- Judicial and administrative mechanisms should be established and strengthened to enable victims to obtain redress.
- The views and concerns of victims should be presented and considered at appropriate stages of the process.
- Offenders should, where appropriate, make restitution to victims or their families or dependants. Where public officials have violated criminal laws, victims should receive restitution from the State.
- When compensation is not fully available from the offender, States should provide compensation to victims or their families in cases of significant physical or mental injury.
- States should consider incorporating into national law norms proscribing abuses of power, including political and economic power. They should also provide remedies to victims of such abuses, including restitution and compensation.

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[22] *S v Makwanyane supra* para 129. (Emphasis added)

[23] See *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* United Nations Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (1992).

It is submitted that the South African government has not responded to these obligations by way of the sentencing legislation it has introduced hitherto. The Criminal Law Amendment Act[24] may perhaps indirectly serve the ends of victims in that it mandates the imprisonment and the incapacitation of victims' assailants for long periods. But this is not redress as envisaged by the United Nations. On the contrary the Criminal Law Amendment Act specifically outlaws the suspension of sentences in certain cases which foreclose the possibility of making a compensation order as a condition of a suspended sentence. Government also passed a new Correctional Services Act,[25] which provides for a sentencing court to fix a non-parole period, when sentencing the offender.[26] In 1997 the South African Law Commission published an Issue Paper[27] on Restorative Justice which has as its aim the empowerment of victims. The Prevention of Organised Crime Act[28] has also recently been enacted. This Act provides for a special Criminal Assets Recovery Fund controlled by a Criminal Assets Recovery Committee. One of the primary purposes of the Criminal Assets Recovery Committee is to assist victims of crime by rendering assistance to these victims.[29]

Despite the introduction of these recent measures I am nevertheless of the opinion that the South African criminal justice system remains inadequate in so far as the recognition and protection of victims' rights are concerned. Its inadequacy is illustrated in the lack of proper compensation procedures, the lack of victims' participation at the sentencing phase and the neglect of victims' rights when predetermined mandatory sentences are imposed. I shall now focus on the provisions in South Africa's sentencing process to show the inability of the system to give true recognition to victims of crime.

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[24] Act 105 of 1997.
[25] Act 111 of 1998.
[26] See s 73(6) of the Correctional Services Act 111 of 1998. See s 75(4) of the Act, which grants a victim the opportunity to make representations to or to attend the Parole Board hearing which will entertain the possibility of parole of the offender.
[27] South African Law Commission Issue Paper 7 Project 82 *Sentencing Restorative Justice - Compensation for Victims of Crime and Victim Empowerment* (1997).
[28] Act 121 of 1998.
[29] See s 68(c) of the Prevention of Organised Crime Act 121 of 1998.

7.3 Compensation

The history of victim compensation can be traced back to the Babylonian Code of Hammurabi some four thousand years ago, which is often cited as the first legal record of victim compensation. In part the Code reads as follows:

> If the brigand has been taken, the man plundered shall claim before God what he has lost; and the city and sheriff in whose land and boundary the theft has taken place shall restore to him all that he has lost. If a life, the city and sheriff shall pay one mina of silver to his people.[30]

Today victim compensation is recognised in the United Nations Declaration.[31] The South African system through the Criminal Procedure Act provides for compensation procedures in terms of sections 297[32] and 300.[33] These sections will be examined in order to determine whether they could sufficiently be used in granting compensation and relief to victims.[34] Without a special compensation procedure in the criminal process, victims are forced to seek redress through the civil process, which could be an expensive alternative if compared to the criminal process. It seems rather illogical to expect a law-abiding citizen to seek compensation through the civil court in instances where a criminal offence has been committed and where the citizen has already had to sacrifice by participating in the criminal process as a witness. Since it is society that has failed to

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[30] See C Edwards *The Hammurabi Code* (1971) at 31.
[31] See 7.2 *supra.*
[32] See s 297(1)(a)(i)(aa), (bb) and (hh); 297(1)(b).
[33] Section 300 of the CPA empowers the court to order compensation upon the application by the injured person or the prosecutor.
[34] See comment by Kriegler *op cit* at 755:

> .... daar word aan die hand gegee **dat skadevergoeding as voorwaarde van opgeskorte straf te dikwels nie oorweeg word nie.** Die strafsanksie is 'n effektiewe insentief; 'n opskortingsvoorwaarde is uit die staanspoor plooibaar en dit kan by latere versuim om te betaal geregtelik aangepas word; die klaer bespaar die koste en beslommernis van uitwinning; en les bes, die strafproses demonstreer aan die beskuldigde, die klaer en die gemeenskap sy genoegdoeningsfunksie. (Emphasis added)

protect victims against the harm or injury suffered in the first place, it follows logically that the harm suffered by a victim as a result of a criminal offence being committed should be addressed through the criminal justice system. It is, however, worth noting that the Department of Justice in its vision statement has recognised that victims are marginalised[35] by the criminal justice system by not receiving due compensation. Although the Department has recognised the shortcoming it has not yet produced any improvement of the compensation procedures in the system. It is submitted that the shortcomings regarding compensation can only be overcome by adopting specific provisions regulating compensation in the criminal process.

An analysis of the practical implementation of s 300 of the Criminal Procedure Act shows that courts in the South African context may order an offender to pay compensation to the victim concerned in addition to any other sentence that is imposed. If the offender is indigent, then it is highly unlikely that any order will be made.[36] Regardless of the fact that an award of compensation may be made without the victim being liable for legal costs, such an award would be meaningless if the accused has no money or any assets with which he could compensate the victim. It is inevitable that, in making an award, the court should take into account the means of an offender.[37] Should the victim therefore request to be compensated for any damage or loss suffered and the accused has no money, an order will rarely be made in favour of the victim.[38] In view of

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Cf. R E Laue 'Sentencing: The victim of crime' (1998) 1 *The Judicial Officer* 72.

[35] See Department of Justice *Justice Vision 2000 - Five Year National Strategy for Transforming The Administration of Justice and State Legal Affairs* (1997) at 63.

[36] It is submitted that the reason why a court would not make a compensation award if the accused has no means to pay the victim is that an award of compensation has the same effect as any civil judgment. This means that if the compensation is not paid execution against the property of the accused may take place in the same way as it would if any civil judgment is not adhered to. See Magistrates' Courts Rules 39-43.

[37] See *S v Medell* 1997 (1) SACR 682 (C) at 686b-c.

[38] An additional problem is foreseen with a compensation award that has been made and then not been adhered to by the offender. It is doubted that incarceration for failure to pay the 'debt' will follow since such incarceration would be deemed as a civil imprisonment for debt, which has been held to be unconstitutional by our courts. See *Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 637 (CC); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 637 (CC).

the profile of the average South African offender there is a strong likelihood that such an award will not be made since it is likely that the offender will come from the poorer parts of society,[39] be unemployed and without realisable assets.

There is, however, a way to deal with this unbearable situation. A state compensation scheme should be introduced. Such a scheme has the advantage of providing compensation to victims, where compensation is due. Consideration should be given to a state scheme, which would enable victims of crime to claim compensation for the harm suffered.[40]

An award in terms of s 300 of the Act would thus be considered as part of the sentence imposed on an offender. A review of this section shows that it has very limited application[41] in our law since it cannot be ordered *meru moto* by the court and it does not provide compensation to be ordered in favour of the survivors of victims.[42] Furthermore, it fails to provide for compensation for emotional shock and pain and suffering[43]

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[39] See Lirieka Meintjies-Van der Walt 'Victory For victims? Recent Developments in Victim Empowerment' (1998) 11 *Acta Criminlogica* 38 at 39.

[40] For forceful arguments in favour of a state compensation scheme, see J P J Coetzer 'Die Slagoffers van Misdaad: 'n Verwaarloosde Groep' (1994) 7 *Consultus* 28 at 30-31.

[41] See *S v Lekgathe* 1982 (3) SA 104 (BSC) at 112.

[42] An award in terms of s 300 of the CPA will only be made if the court is requested to do so by either the victim or the prosecutor acting on the instructions of the victim concerned.

[43] See *S v Liberty Shipping and Forwarding (Pty) Ltd* 1982 (4) SA 281 (D). Didcott J interpreted the provision as excluding compensation for pain and suffering in the following words at 284H-285A:

> The proposition that the 'damage' in question is not limited to damage to property but encompasses all kinds of damage means, if it is found that a Court convicting someone of assault, rape, *crimen iniuria* or criminal defamation may itself proceed to award the victim general damages as compensation for the injury to person, dignity or reputation he or she has suffered. Never, as far as I am aware, has such an award been made or even sought under s 300(1) or either of its predecessors. The likelihood that Parliament had this in mind does not seem strong. It postulates an inquiry of the sort and scope making it an unsuitable epilogue to criminal proceedings.

occurring as result of the commission of the offence.[44] The provision would serve justice better if it provided for 'any or all damages' resulting from the commission of an offence.[45]

It is submitted that compensation would be more regularly ordered if the courts were compelled to consider compensation in each case; unless requested by the victim not to be compensated. In the manner that the provision is currently drafted courts are not obliged to consider compensation as part of the sentencing option, they are only required to order it if requested to do so. Section 300 of the CPA as it currently stands is not victim friendly and should be amended to be of more use and assistance to the very people that have suffered as a result of the commission of criminal offences.

Section 300 of the CPA is not the only mechanism available to the court to apply in order to compensate victims of crime. The court would be able to suspend or postpone sentence in terms of s 297 of the CPA on condition that an accused either compensate the victim or perform some service to the community.[46] In **R v Bepela**[47] Hiemstra CJ regarded a suspended sentence as a much more practical way of compensating victims. The benefit of s 297 of the CPA as a tool to compensate is that there is no monetary limit to the amount that the court should order the accused to pay.[48] The scope of this provision is extremely broad and it could be of great assistance to victims. A review of sentences imposed in most of the South African courts demonstrates, however, that courts seldomly impose suspended sentences with the aim of compensating the victim.[49] It is surmised that one of the main reasons why courts do not consider such a condition of suspension of

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[44] See s 300(1) that refers specifically to compensation for damages and loss that occurred to property.

[45] See s 35 of the Powers of Criminal Courts Act of 1973 of the United Kingdom that makes provision for such an award. The section provides for 'all damages caused' as result of the offence.

[46] See generally A St Q Skeen 'Compensating the victim of crime – A useful but limited remedy' (1988) 17 *Businessman's Law* 187.

[47] 1978 (2) SA 22 (B).

[48] If s 300 is used then the monetary limit for an award in the regional court would be R300 000 and in the district court R60 000. See GN R1410 Gazette 19435 of 30 October 1998.

[49] See J P J Coetzer *op cit* at 31.

the sentence is that the circumstances of the victim are not always on record. Should the legislature, however, introduce a method of supplying such data to the court prior to the sentence being imposed, victims would be in a position to benefit from the use of this section more than what they would benefit from the use of s 300 of the CPA.

7.4 Victim impact statements

The Criminal Procedure Act does not make provision for victim impact statements to be used before sentence is imposed, as is customary in countries like New Zealand and the United States of America. This does not mean that the practical implementation and possible consequences of victim impact statements should not be investigated as an option of giving recognition to the victims of crime. The South African Law Commission considered this type of statement as one of the possible solutions for empowering victims in the criminal justice system.[50] I shall now examine its value and usefulness.

What is a victim impact statement and what role, if any, should it fulfil at the sentencing phase? Prof Naudé defines this statement as a document that is intended to provide information to the court concerning the physical, financial, emotional and psychological effects of a crime on a crime victim, and, where relevant, his or her family.[51] The purpose of such statement would be twofold: first to reintegrate the victim into the court process; and secondly, to improve the quality of sentences by balancing the rights of the accused with those of the victim.

Dr Snyman, a former member of the South African Law Commission's Project Committee on Restorative Justice, contends that the statement may be used to include subjective facts like the victim's feelings about the crime and about the sentence that

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[50] See South African Law Commission Issue Paper 7, Project 82 *Sentencing Restorative Justice - Compensation for Victims of Crime and Victim Empowerment* (1997).
[51] See B Naudé 'Dealing with the victims of crime – the role of the legal profession' (1997) 10 *Consultus* at 58.

should be imposed.[52] Such statements, so it seems, will have more than one advantage for the sentencing process because not only will they give victims the opportunity to be active participants in the criminal justice system but they could also serve an useful function in collecting relevant data for purposes of sentencing. The victim impact statement could be used as a tool to get important evidence on record without delaying the case. The value of a victim impact statement could perhaps be illustrated by reference to the case of **S v P.**[53] The presiding officer in this matter requested the submission of evidential material to enable the court, to pass an appropriate sentence.[54] This serves as proof of the necessity of such statements prior to sentence.

(a) New Zealand

A country that has succeeded in implementing victim[55] impact statements is New Zealand. Section 8(1) of the New Zealand Victims Offences Act[56]provides as follows:

> Appropriate administrative arrangements should be made to ensure that a sentencing judge is informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim.

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[52] See n49 *supra* at para 2.30.

[53] 1989 (1) SA 760 (C).

[54] In this matter the accused was convicted on a charge of rape, after he pleaded guilty to the charge. The court required evidential material, like a statement of the complainant and other relevant circumstances pertaining to the case, in order to impose the most appropriate sentence.

[55] Victim is specially defined in s 2 of the Act which states:

> *Interpretation* – In this part of the Act, the term 'victim' means a person who, through or by means of a criminal offence (whether or not any person is convicted of that offence), suffers physical or emotional harm, or loss of or damage to property; and, where an offence results in death, the term includes the members of the immediate family of the deceased.

[56] The Victims of Offences Act came into operation in 1987.

Subsection (2) of s 8 provides that the information is to be conveyed to the court either orally by the prosecutor or by means of a written statement. It is contended that victim impact statements adduced in these ways would in most instances, within the South African context, constitute hearsay testimony that generally would be excluded as inadmissible evidence. This obstacle could, however, be overcome by the creation of a new statutory exception to the general hearsay rule with specific reference to victim impact statements. Such a provision would then save the victim the burden of re-appearing at court and of tendering *viva voce* evidence. It should be borne in mind that the primary reason why hearsay evidence is excluded in our law is because it carries a high risk of being unreliable as evidence.[57] The same risks do not, however, arise in admitting victim impact statements if such a provision regulating the admission of such evidence would compel the prosecution to submit only victims' statements that correspond with the facts proved in each case. Should there be any dispute regarding the statement, or if the statement does not correspond with the facts proved in the specific case, then *viva voce* evidence could be tendered. Such a procedure will be fair and will ensure that no prejudice will be suffered by the accused.

It is submitted that if a statement were to exceed the boundaries of admissible evidence it would not be helpful to the sentencing judge and it would carry with it the danger of influencing presiding officers to impose inappropriate sentences.[58] Such danger is indeed a real consideration, which is most eloquently stated by Tipping J in **R v F:**[59]

> A sentencing Judge must hold a fair balance between the interests of the person to be sentenced on the one hand and those of the victim and society on the other. Care must be taken when holding that balance to avoid the

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[57] See Schwikkard et al *op cit* at 156. It has been argued that hearsay testimony offers no opportunity for cross-examination, hence the risk of being unreliable as evidence. Cf. Hoffmann and Zeffertt *op cit* at 125.

[58] For a critical review of victim impact statements see the discussion by Geoff Hall 'Victim Impact Statements: Sentencing On Thin Ice?' (1992) 15 *New Zealand Universities LR* 143.

[59] (1989) 4 CRNZ 365.

> risk of trial by victim impact statement. Such statements must fully serve their statutory purpose but should not be allowed to trespass outside the reasonable ambit of that purpose.

A review[60] by John Rowan, a practitioner of Wanganui, reveals that victim impact statements are not favoured by all judges in New Zealand. In support of his contention he refers to a statement by Justice Holland who said the following with reference to victim impact statements:

> I don't believe that any judge, in imposing sentences, isn't aware already that people suffer as a result of crime. We sit through it day after day, seeing the people giving evidence. The victim is not in a good position to give a reasoned view of what is appropriate. They are after revenge; it's an ordinary human reaction. I rather think we get too carried away by what victims say we will be influenced in some case by revenge.[61]

It is submitted that the judicial comment by Justice Holland reflects a generalisation of the emotions of victims and their survivors. Surely fairness should dictate that all factors be submitted to the court before sentence, in order to balance all rights; not only those of the accused. An improper balance of these rights can only lead to unfair and unjust sentences. It is, however, contended that South Africa can learn from the New Zealand experience and the methods used by it in giving recognition to victims at the sentencing stage.

(b) United States of America

Witnesses in the United States have been more fortunate in that they have become a major feature of victimological developments over the past thirty years: they are truly recognised as participants in the criminal justice system at all stages. All kinds of

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[60] See J Rowan 'Victim Impact Statements' 1988 *New Zealand Law Journal* 194.

initiatives were developed in order to improve services offered to victims, including services at the sentencing phase. In fact the Reagan administration made victims such a priority that a President's Task Force on Victims of Crime was established with its emphasis on the prevalence of crime and more particularly the problems of secondary victimization of witnesses.[62] An important development for victims in the United States was the introduction of the Federal Victim and Witness Protection Act.[63] This Act is important because of the wide powers that it grants to a federal sentencing court to order restitution.[64] [65] Sentencing courts in the states, by applying the VWPA, have aggressively compensated victims of crime through restitution orders, and have showed acceptance of quasi-legislative control over the sentencing process.[66]

Other legislation that affects the rights of victims at the sentencing phase is the Victims of Crime Act of 1984.[67] In 1982 the Victims of Crime Act made victim impact statements

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[61] *Ibid* at 194 and 195.
[62] R I Mawbay and S Walklate *Critical Victimology* (1994) at 136-137.
[63] The Victim and Witness Protection Act of 1982, Pub L No 98-473 of Stat 1987 (1984), codified in 18 U.S.C.A, hereinafter referred to as the VWPA. Since 1982 the VWPA has undergone seven amendments with the last amendment in 1990.
[64] For a discussion of the restitution powers under the Victim and Witness Protection Act of 1982, see L P Fletcher 'Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability' (1984) 93 *Yale Law Journal* 505.
[65] See sections 3663 and 3664 of the 18 U.S.C. Section 3663(a) of 18 U.S.C provides as follows:

> (1) The court, when sentencing a defendant convicted of an offence under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanour, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense. (2) For the purpose of restitution, a victim of an offense that involves as an element, a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. (3) The court may also order restitution in any criminal case to the extent agreed to by the parties in the plea bargain.

[66] For a discussion of the judicial application of restitution under the VWPA see Lionel M Lavenue 'The Corporation as a Criminal Defendant and Restitution as a Criminal Remedy: Application of the Victims and Witness Protection Act by the Federal Sentencing Guidelines for Organizations' (1993) 18 *Journal of Corporation Law* 441.
[67] Pub L No 98-473, 98 Stat 2170 (1984).

mandatory in all federal cases where a pre-sentence report was filed at the court. In the American context the Act was also seen as a major catalyst in improving compensation programmes.[68] Today most states have their own legislation providing for the rights of victims and regulating victim impact statements.[69] Since the State of Washington has been in the forefront[70] of promoting victims rights, I shall focus on its Crime Victim's Bill to show how extensively one can provide for the rights of victims, including their right to be heard at the sentencing phase.[71]

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[68] One of the reasons why it was seen as a major breakthrough for victims, was because it lead to the establishment of a Crime Victims Fund, which provides for compensation to eligible victims.

[69] See R I Mawbay and S Walklate *op cit* at 138.

[70] See Ken Eikenberry 'The Elevation of Victim's Rights in Washington State: Constitutional Status' (1989) *Pepperdine LR* 19 at 24.

[71] See s 7.69.030 of the Wash Rev Code that provides as follows:

> There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights:
> (1) With respect to victims of violent or sex crimes, to receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county;
> (2) To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;
> (3) To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;
> (4) To receive protection from harm and threats of harm arising out of co-operation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;
> (5) To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;
> (6) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;
> (7) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;

The rights of victims at the final phase of the criminal justice process are well protected, even in cases of capital punishment.[72] The rights of victims to submit a statement pre-

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(8) To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will co-operate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;
(9) To have access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;
(10) With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program present at any prosecutorial or defense interviews with the victim, and at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;
(11) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;
(12) With respect to *victims and survivors of victims*, to be *informed by the prosecuting attorney of the date, time, and place* of the trial and of *the sentencing hearing* for felony convictions upon request by a victim or survivor;
(13) To submit a *victim impact statement or report to the court*, with the assistance of the prosecuting attorney if requested, *which shall be included in all pre-sentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;*
(14) With respect to *victims and survivors of victims*, to *present a statement personally or by representation, at the sentencing hearing* for felony convictions; and
(15) With respect to victims and survivors of victims, to entry an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment.
(Emphasis added)

[72] Cf. *Booth v Maryland,* 306 Md 172, 507 A 2d 1098 (1986) vacated in part and remanded, 482 US 496 (1987). In this case the Supreme Court reversed a decision of the Maryland Court of Appeals and held that the eighth amendment prohibited a victim's statement in a capital murder case. Although the court only dealt with these statements in

sentence have recently been constitutionally challenged in the State of Washington[73] without success. An examination of the procedures used in tendering these impact statements as evidence before the court shows: that victims are either called upon to give oral testimony[74] or called upon to merely submit written statements regarding the damage suffered by them.

It is important that a court when sentencing a murderer should not lose sight of the 'victim' who is no longer alive. Personal recognition of such 'victim' is achieved by

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cases of capital punishment it was seen as a setback for victims' rights. The Court's opinion is stated at 507 as follows:

> We note, however, that our decision today is guided by the fact that death is a 'punishment different from all other sanctions,' ... and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations. At least 36 States permit the use of victim impact statements in some contexts, reflecting a legislative judgment that the effect of crime on victims should have a place in the criminal justice system... Congress also has provided for victim participation in federal criminal cases... We imply no opinion as to the use of these statements in noncapital cases.

[73] See *State v Gentry* 125 Wash 2d 570, 617-633, 1134-43 (1995). In this case the father of the victim was called to testify. He testified about the victim's interests, and her plans for the future before she was killed. He discussed the effects of his young daughter's murder on his work, his emotions and his family. In closing argument, the prosecuting attorney recalled much of this testimony in noting the lost opportunities of the victim and her family and how the crime had affected them. No evidence was admitted regarding the victim's family's opinions of the appropriate punishment. The defendant in the matter argued that the Court erred by allowing such testimony and argument during his sentencing proceeding. Two issues arose with regard to this victim impact evidence: (1) Whether the Constitution of the United States bars the introduction of victim impact statements at capital sentencing proceedings; and (2) Whether such impact testimony was barred by the Washington State Constitution. Considering the issues the Court held that there is no federal or state law that *per se* bar the introduction of victim impact evidence in the penalty phase of a capital case and that such evidence is admissible under Washington law. It also held that the victim impact statement of the father was *in casu* not violating any of the defendant's due process rights.

[74] A telephonic interview with a prosecuting attorney, William Berg, of the Office of the Prosecuting Attorney, King County, Washington, reveals that this 'testimony' by the victim or survivor is practically an unsworn statement by the witness stating the impact of the crime. The defence has, nevertheless, a right to challenge the statement in terms of Crim Rule 7.1.

affording survivors of those 'victims' to testify before sentence. The importance of such personalisation is most succinctly stated by Justice O'Connor in **State v Payne**:[75]

> Murder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.[76]

This quote so aptly portrays the reason why the testimony of victims and survivors is needed in the sentencing process, viz to guard against the chance of these victims becoming pieces of evidence instead of people with their own identities. To the point is a statement by the venerable Justice Cardozo in **Snyder v Massachusetts**:[77]

> ... justice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.[78]

7.5 Conclusion

It is submitted that the answer to some of the problems posed does not lie with a removal of the sentencing function from the judiciary, but in providing the judiciary with all relevant information before sentence, and by equipping sentencing officers with the

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[75] 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991).
[76] *State v Payne supra* at 2612.
[77] 291 US 97, 122 78 L Ed 674, 54 S Ct 330 (1934).
[78] *Snyder v Massachusetts supra* at 338.

necessary skills to pass sentences which are fair to all. It is regrettable that despite the noble objectives of the Department of Justice to transform the criminal justice system to be sensitive to the needs of victims, its endeavours have not yet brought about true recognition of victims' rights in all phases of a criminal trial. The stark reality is that there is no provision in the Criminal Procedure Act which compels sentencing officers to pay special attention to victims and to their circumstances as a matter of priority. This contemptuous disregard of victims' rights should be addressed as a matter of urgency. It is submitted that the problem can only be remedied by developing new sentencing procedures that will grant victims of crime as of right an opportunity to be part of a litigation process that once belonged to them.

Chapter 8

8. Conclusion

> **The victims of crime are the forgotten link within the American criminal justice system. Where every conceivable kind of aid and assistance is given to criminal defendants, including free legal representation, counseling, rehabilitation, and a host of other services, the persons victimized by criminals are, for the most part, left to try and function on their own. As many of the victims are elderly or poor people, in many cases they are unable to function, and the victimization which itself may have only taken a few minutes continues on for months and years. I do not criticize the fact that the perpetrators are given substantial services at he taxpayers' expense – such an attitude is, it is said, the mark of an enlightened society. However, I do believe that those persons victimized should receive at least some assistance at the taxpayers' expense to help them through what is often the most traumatic experience of their lives.**[1]

Although this statement was made with reference to the American criminal justice system in 1979, it could easily have been made about the South African criminal justice system in 1999. Some commentators may immediately respond by saying that the reason for the emphasis on the rights of the accused, is the protection that the South African Constitution affords to the accused. In this study the importance of such constitutional guarantees has been recognised. More importantly, however, it has been shown that witnesses need not remain the forgotten people of the system. All that the legislature needs to do is to adopt the legislative amendments to the Criminal Procedure Act

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[1] Statement by Senator P Laxalt, at the 96th Congress, Senate Judiciary Committee Hearing. See Congressional Record, 96th Congress, 1 March 1979 as quoted by Alfred S Regnery in Hans Joachim Schneider (ed) *The Victim in International Perspective* (1982) at 377.

proposed in the course of this thesis. Legislative change is required as a matter of necessity to make the system more victim-orientated without denying the accused his basic rights to a fair trial.

Throughout this thesis it has been demonstrated that in many aspects of the criminal justice process witnesses run the risk of being shortchanged. The analysis of the law affecting witnesses revealed that the law either positively discriminates against witnesses and victims or at best affords them insufficient protection.[2] A focus on the pre-trial phases leading to trial showed that witnesses are not always consulted before giving testimony and that they suffer psychological harm due to the breakdown of communication between the state and themselves.[3] It is regrettable that more is not done by the Department of Justice to make the process less traumatic for witnesses. Witnesses need to be informed of their rights and of how to exercise these rights. It is also important to inform them both of how the criminal justice system operates, and why it so operates. Witnesses' understanding of why it is that preference is given to the rights of the accused, in certain instances, makes the process a less alienating experience for them. The advantages of such an information scheme for witnesses were highlighted in a pilot project that was conducted at the Wynberg Court during July 1997.[4] The response amongst the witnesses who participated in the project was overwhelmingly positive. This is cogent proof that with a little effort and money a change can be brought about which dramatically improves the quality of services rendered to witnesses in the criminal justice system.

Amongst the areas where reform is most urgently needed are: the treatment of witnesses before trial,[5] the interests of witnesses at the bail process,[6] the treatment of witnesses in

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[2] See discussion of ss 153, 170A, 185, 185A, 189, 300 and 205 of the CPA.
[3] See discussion of bail - chapter 4 *supra* particularly discussion about the importance of communication between witnesses and the prosecution.
[4] Law students handed witnesses' manuals to the witnesses at the court. Before the trial the students explained the contents of the manual to each individual witness and offered assistance to those witnesses who required further information and/or help.
[5] See discussion 2.1-2.4 *supra*.

testifying,[7] the treatment of rape[8] and child witnesses[9] and the rights of victims at the sentencing phase.[10]

Protection of witnesses should be given high priority in any criminal justice system. The government has made some progress in the provision of witness protection by adopting far reaching legislation to afford better protection to witnesses. The legislation is, however, not yet in operation and it is seriously doubted whether the Witness Protection Act[11] will ever be successfully implemented by the Department of Justice, due to severe budgetary constraints under which the Department operates. The legislation is nevertheless applauded as at least it has the potential to address some of the shortcomings in the system regarding protection of witnesses.

It has also been shown that witnesses remain vulnerable when required to give testimony. Their vulnerability is increased by cross-examination techniques which are still permitted in our courts and which in many instances can only be described as abusive and traumatic. Cross-examination of course remains an integral part of the adversarial system and there is no way of escaping the process as long as our system remains adversarial. The solution, however, lies with the control of these abusive practices. The legislature has responded to the criticisms levelled at these practices by enacting new legislation, which is aimed at controlling cross-examination that is unreasonable and unnecessarily protracted.[12] The authority of presiding officers to control such cross-examination is strengthened by a new statutory provision which empowers them to award costs against a party that is responsible for unduly delaying the trial process, either by way of irrelevant cross-examination or through any other delaying tactic.[13] The section relating to costs is however not yet in operation. Whether courts will firmly control the process in future

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[6] See discussion 4.1-4.10 *supra*.
[7] See discussion 3.1-3.2 *supra*.
[8] See 5.1-5.4 *supra*.
[9] See 6.1-6.7 *supra*.
[10] See 7.1-7.5 *supra*.
[11] See discussion of the Witness Protection Act 112 of 1998 at 2.3.2 *supra*.
[12] See discussion of s 166(3)(a) and (b) of the CPA at 3.1.3 *supra*.

remains to be seen. It will be recalled that the significance of s 166(3) of the CPA was questioned when discussed. This section requires the court to exercise its control over the cross-examination, yet at the same time it is expected of the court, in terms of the Constitution, to do so without interfering or encroaching upon any fair trial rights of the accused. Exercising control over cross-examination is by no means an easy thing to do, particularly if it is borne in mind that a very fine line exists between what could be considered as justifiable cross-examination of a witness, for example cross-examination that is aimed at discrediting a witness, and protracted cross-examination. This could somehow explain why courts may be found to be reluctant in pro-actively enforcing control over cross-examination. The protection afforded to witnesses in future will depend on the way that courts will apply this provision, which could mean that witnesses might be just as vulnerable as they were before, despite this amendment to the CPA.

The discussion of recalcitrant witnesses[14] once again shows that these witnesses are not properly informed of their legal rights and the consequences of their refusal to co-operate with the state in prosecuting the accused. The proposal regarding recalcitrant witness as discussed should not be seen as a proposal that witnesses should not be compelled to testify in certain instances but simply that witnesses should be informed of their legal position. Recalcitrant witnesses can escape liability only if they have a just excuse for not testifying and they should be informed of that fact prior to the trial if they show unwillingness to testify. The term 'just excuse' is, however, not definitively or inclusively defined in our law, which has lead to arbitrary interpretations by the South African courts and which has created legal uncertainty. In view of the severe consequences that could follow from a refusal to testify, it is necessary that the concept be defined, as this will not only be in the interests of witnesses but will be in the interests of justice as a whole.

Certain witnesses, like rape victims and child witnesses, require special attention in view of the psychological harm that these witnesses have to suffer. Rape victims are faced with

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[13] See s 342A of the CPA.

inordinate victimisation within the system: on a substantive level the definitional limits of the offence discriminate between male and female victims; moreover the intimate nature of the offence intensifies the ordeal of witnesses testifying in court, and who are obliged to reveal intimate and personal details to the court.[15] Rape victims cannot claim as of right that their trial be heard *in camera.* It is therefore proposed that s 153 of the CPA be broadened to make it compulsory that all rape trials be heard behind closed doors.

In a focus on the evidential problems that rape victims have to overcome in the system, it has been shown that little protection is afforded to these victims in protecting them from cross-examination on their unrelated sexual past. It has also been argued that courts have placed too much emphasis on the time at which the complaint is lodged. The continued use of previous consistent statements of complainants in sexual offences should be re-examined in light of the fact that no cautionary rule needs to be applied in dealing with the testimony of these witnesses. In addition, an analysis of rape shield laws shows that although they might improve the protection afforded to victims regarding their sexual past they are constitutionally suspect, and that more research should be done before South Africa adopts such legislation.

In so far as child witnesses are concerned, amongst the disadvantages that these child witnesses have to face is that they have to testify in a system that is primarily designed for adults. The South African system has only recently acknowledged the need for child witnesses to give testimony in a more child-friendly environment. Although progress has been made in this regard, more reform is required. Children's testimony is affected by any delay and the system should be reformed to ensure that matters involving child witnesses are disposed of within a short period of time. Such reform will again benefit both the child and the system as a whole: the child will be in a position to receive counselling or rehabilitation if it is needed, and at the same time the credibility of these witnesses will be enhanced by the fact that their memory would not have been affected by any delay. Should such a proposal not be feasible in the light of the congested court

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[14] See discussion at 3.2 *supra.*

rolls and the lack of court personnel, then consideration should be given to the courts receiving the testimony of these witnesses second hand: either by means of a pre-recorded videotape of an interview with the child or by way of an interviewer who has spoken to the child and who will testify in court. Both these proposals have been discussed in detail.[16]

The rights of witnesses are not even recognised at the sentencing process, notwithstanding the fact that they have a special interest in the sentence that will be imposed. It is proposed that due recognition be given to victims at this final stage of the trial, as of right. They should be given the opportunity to explain to the court the impact that the crime has had on them. Such evidence could be received through the admission of a victim impact statement. This statement could serve a dual purpose: it will give recognition to victims at this important stage of the trial and the information provided will assist the sentencing officer in passing an appropriate sentence.

Finally it is proposed that a victim compensation scheme be introduced. At present, compensation is only awarded to victims if the accused's financial circumstances permit such an award. This means that if the accused is indigent or financially not in a position to pay compensation then the court will simply refrain from awarding compensation. Justice will be better served if victims as of right will be in a position to claim compensation as is the position in other countries that claim concern with the rights of victims of crimes, and not only with the perpetrators of crime.

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[15] See discussion at 5.2.3 *supra*.
[16] See discussion at 6.3.1 *supra*.

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